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**THE RIGHT TO SANITATION IN INDIA:
A MULTI-FACETED RIGHT IN SEARCH
OF A COMPREHENSIVE FRAMEWORK**

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Thesis submitted for the degree of PhD

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ABSTRACT

Sanitation scenario in India is far from satisfactory. Improper disposal of waste, widespread open defecation, violence against women in the context of defecation, manual scavenging and violation of the rights of sanitation workers are some of the critical issues in this regard. The absence of, or inadequate, sanitation adversely affects human dignity, realisation of a number of human rights such as the rights to health, water, environment and education, and it disproportionately affects the poor and the marginalised sections of the society. These situations lead to and necessitate the emergence of the right to sanitation.

The right to sanitation has been recognised in the Constitution of India. There are also statutes that are relevant in the right to sanitation context. In addition to that, the policy framework plays a key role in the implementation and regulation of sanitation interventions. In this context, this thesis examines the nature and scope of the right to sanitation as recognised in the Constitution of India and carries out a mapping of the existing statutory and policy framework governing the realisation of the right.

There are a number of social and cultural factors that influence or determine the conceptualisation and implementation of the right to sanitation. In this context, this thesis critically analyses the realisation of the right to sanitation from four perspectives—gender, environment, caste and labour. Overall, this thesis presents a comprehensive conceptual framework for the right to sanitation in India that takes into consideration all the relevant dimensions of the right including dimensions that are specific to the Indian context such as manual scavenging and unpacks some of the key factors that pose challenges for a holistic understanding of the right and its realisation.

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I have been carrying sanitation issues in my bag for the last four years. It has been a life with mixed feelings and diverse experiences. Academically, it has been a challenge to engage with issues that are contemporary in nature. At the same time, it was depressing too to witness the life of certain individuals or group of people to whom fate was a solace and law and human rights were distant dreams at the best. While I am academically excited to have been introduced to a catena of issues from diverse perspectives, it is so sad to underline that a large number of my fellow citizens still need to fight a long battle for their basic rights. I sincerely hope this thesis will contribute to their fight for rights and justice.

I am aware that as the author of this thesis I am responsible for the substance of this thesis. At the same time, I am indebted to a number of individuals who have contributed to this work in different ways. Most importantly, I would like to thank the dozens of individuals who shared with me their experiences, concerns, anger and perspectives on a variety of sanitation-related issues. This thesis would have been incomplete without them. An equally important person to whom I owe a lot is my supervisor and mentor, Prof. Philippe Cullet. I feel lucky to have such a person who is sympathetic to the issues and concerns of the poor and the marginalised to guide me academically. I would like to thank Philippe for helping and encouraging me to overcome intellectual and personal crises I faced during this period.

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LIST OF ACRONYMS

AIR: All India Reporter

BIS: Bureau of Indian Standards

CESCR: Committee on Economic Social and Cultural Rights

CLTS: Community-Led Total Sanitation

CPCB: Central Pollution Control Board

CPHEEO: Central Public Health and Environmental Engineering Organisation

CRSP: Central Rural Sanitation Programme

CSDS: Centre for the Study of Developing Societies

FANSA: Freshwater Action Network

FYP: Five Year Plan

GLR: Gujarat Law Reporter

GP: gram panchayat

ICESCR: International Covenant on Economic Social and Cultural Rights

IEC: Information, Education and Communication

IHHs: Individual Household Latrines

ILCS: Integrated Low Cost Sanitation

JMP: Joint Monitoring Programme

JNNURM: Jawaharlal Nehru National Urban Renewal Mission

MDGs: Millennium Development Goals

MHM: Menstrual Hygiene Management

NBA: Nirmal Bharat Abhiyan

NCSK: National Commission for Safai Karamcharis

NGOs: Non-Governmental Organisations

NGP: Nirmal Gram Puraskar

NGT: National Green Tribunal

NUSP: National Urban Sanitation Policy 2008

ODF: Open Defecation Free

PRIs: Panchayati Raj Institutions

SACOSAN: South Asian Conference on Sanitation

SDGs: Sustainable Development Goals

SBM: Swachh Bharat Mission

SCC: Supreme Court Cases

SCs: Scheduled Castes

SHARE: Sanitation and Hygiene Applied Research for Equity

SKA: Safai Karamchari Andolan

SOPPECOM: Society for Promoting Participative Ecosystem Management

MNREGA: Mahatma Gandhi National Rural Employment Guarantee Act

SPCB: State Pollution Control Board

STs: Scheduled Tribes

TSC: Total Sanitation Campaign

UIDSSMT: Urban Infrastructure Development Scheme for Small and Medium Towns

ULBs: Urban Local Bodies

UN: United Nations

UNDP: United Nations Development programme

UNICEF: United Nations Children's Fund

WHO: World Health Organization

WSSCC: Water Supply and Sanitation Collaborative Council

LIST OF WORDS REFERRED IN LOCAL LANGUAGES

Abhiyan: campaign

Daliya jalao: burn the basket

Gram Panchayat: a self-governing unit at the village level

Gram Sabha: a body consisting of all persons eligible to vote in a village

Gramin: rural

Jagir: entitlement

Malinya Mukta Keralam: waste free Kerala

Maryada: dignity

Nigrani: monitoring

Nirmal Gram Puraskar: clean village prize

Nirmal Bharat: clean India

Nirmal grams: clean villages

Pradhan: the president of a Gram Panchayat

Purdah: veil

Rashtriya Swasthya Bima Yojana: National Health Insurance Scheme

Safai Karamchari Andolan: sanitation workers' movement

Safai karamcharis: sanitation workers

Sarva Siksha Abhiyan: universal education campaign

Swachh Vidyalaya Puraskar: clean school prize

Swachh Bharat Swachh Vidyalaya: clean India clean schools

Swachh Bharat: clean India

Yatra: journey

INTRODUCTION

PROLOGUE

I was born and grew up in a village in northern Kerala. I remember that when I was a child, my family members used to walk to a rivulet early in the morning to defecate. I also remember that my elder sister used to wash and dry pieces of cotton cloths for a few days every month and she always used to evade my question about why she did it separately and secretly. These images gradually faded from my memory and it never occurred to me that sanitation was an issue mainly because private toilets had become a norm in places where I lived and I had even stopped noticing my sister's activities at home. Years later, I had the opportunity to travel in rural areas in north India and I witnessed certain situations that led me to realise that lack of sanitation is still a reality that a large number of people in this country are grappling with. I also realised that many issues related to sanitation are not visible because they are systematically hidden, as my sister did, because of the taboos associated with them. More specifically, I have experienced a few incidents that have cumulatively shaped the development of this thesis.

In 2014, I visited Lunas village in Churu district of Rajasthan, which had been in the news for being declared an open defecation free (ODF) village. Indeed, I saw a number of toilets but many of them were either not used at all or they were used for other purposes such as for storing firewood or dried cow dung. My subsequent visits to other districts in Rajasthan and Kerala revealed a similar scenario. They were ODF villages on government records, but open defecation or public health and environmental issues due to human excreta were prevalent. A few months later, the Prime Minister of India launched the Swachh Bharat Mission (SBM), which seeks to make India ODF by 2 October 2019. Since then, the number of ODF villages and districts has increased exponentially. While this thesis was being finalised, six states and one Union Territory were declared ODF. On 1

November 2016, the state of Kerala—my home state—was declared ODF. It was so declared without adequate toilet facilities in public places and with only one district having a septage treatment plant. Thus, people in the state are expected either to defecate and urinate in the open when they are outside of their houses, which is comparatively more difficult for women, or to control their urge to defecate or urinate until they reach their houses. Private parties are collecting septage in tankers and dumping it clandestinely in open spaces or freshwater bodies.

In 2010, while I was travelling with some of my colleagues in Khandwa district of Madhya Pradesh, we came across a community toilet complex. As we were walking out of the toilet complex, which was more or less filled with human excreta on the toilet seat as well as on the floor (apparently due to inadequate water supply coupled with the huge number of people who regularly used the toilet complex), we saw a woman cooking her lunch in a tiny dark room that shared a wall with the men's toilet complex. A brief discussion with her revealed the following facts: she and her husband were living in that room because her husband was the caretaker of the toilet complex, she cleaned the toilet complex which her husband had been assigned to do, she and her husband had to flee from their village because they decided to marry each other against the will of their parents and she was a dalit. Outside the toilet complex, we saw human excreta and wastewater from the toilet complex flowing through a narrow drain to a nearby open space, which revealed the fact that there was no mechanism to collect and treat the septage and wastewater.

While this thesis was being finalised, ten sanitation workers died in Delhi while cleaning sewers in the city in a short span of five weeks in the months of July and August. These incidents took place three years after the Supreme Court of India categorically prohibited the entry of human beings into sewer lines without protection, and four years after the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013 came into force, which also explicitly prohibited the entry of workers into sewer lines without protective gear.

These anecdotes highlight some of the key issues related to sanitation in India—inadequacy of sanitation infrastructure, open defecation, environmental pollution due to lack of or inadequate sanitation, the link between sanitation and factors such as caste, gender and class, and exploitation of sanitation workers. They also highlight that while there have been certain law and policy responses to these sanitation-related issues, many of them remain inadequate in terms of substance as well as implementation. In this context, this thesis analyses these issues and challenges from a right to sanitation perspective.

I. BACKGROUND

A. TOWARDS A BROADER UNDERSTANDING OF SANITATION

Sanitation is a volatile concept that is understood differently by different actors in different contexts. As a result, there is no single agreed definition of the term ‘sanitation’ at the national level or at the international level. The meaning of sanitation varies from a limited focus on the issue of disposal of human excreta by different means such as cesspools, open ditches and pit latrines,¹ to a comprehensive concept that includes among other things liquid and solid waste disposal, and personal, domestic and environmental hygiene.²

Robert Lenton et al, in their report for the United Nations (UN) Millennium Project Task Force on Water and Sanitation, use the term ‘basic sanitation’. The term ‘basic sanitation’ means:

The lowest cost option for securing sustainable access to safe hygiene and convenient facilities and services for excreta and sullage disposal that provide privacy and dignity while ensuring a clean and healthful living environment both at the home and in the neighbourhood of users.³

The above-mentioned definition focuses on the limited aspect of management of human excreta from the point of view of privacy and dignity of individuals as well as the quality of the environment.

¹ eg Integrated Low Cost Sanitation Scheme Guidelines 2012.

² eg National Urban Sanitation Policy 2008.

³ R Lenton et al, *Health, Dignity and Development: What will it Take?* (Earthscan 2005).

The Joint Monitoring Programme for Water Supply and Sanitation of the World Health Organization (WHO) and the United Nations Children's Fund (UNICEF) (WHO-UNICEF JMP) has adopted a ladder concept that originally included four graded situations ranging from 'open defecation' at the bottom of the ladder to 'improved sanitation facilities' at its top.⁴ The term 'improved sanitation facilities' denotes facilities that ensure hygienic separation of human excreta from human contact.⁵ The ladder concept has been modified subsequently to include five graded situations starting from open defecation at the bottom of the ladder to 'safely managed facilities' at its top.⁶ The term 'safely managed facilities' means 'use of improved facilities that are not shared with other households and where excreta are safely disposed of in situ or transported and treated offsite'.⁷ The UN Independent Expert (subsequently the Special Rapporteur) on the issue of human rights obligations related to access to safe drinking water and sanitation has defined sanitation as a 'system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene...'⁸

It can be seen that the term 'sanitation' has been defined with varying scope and meaning. While Lenton et al approach sanitation from the point of view of privacy, dignity and health, the WHO-UNICEF JMP uses a ladder concept wherein sanitation is evaluated in terms of the availability of certain facilities. The UN Independent Expert suggests a definition that mainly focuses on the management of human excreta. A major limitation of these definitions is that their focus is limited to the issues of management of human excreta and associated hygiene. While these are important dimensions from human rights, public health and environmental perspectives, there are other equally important dimensions such as the social and cultural aspects (eg manual scavenging) which are generally missing from these definitions at the international level.

⁴ WHO and UNICEF, Progress in Drinking-water and Sanitation: Special Focus on Sanitation, Report of the WHO-UNICEF Joint Monitoring Programme for Water Supply and Sanitation (WHO/UNICEF 2008) 6.

⁵ *ibid.*

⁶ *ibid* 8.

⁷ *ibid.*

⁸ Report of the UN Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, UN Doc A/HRC/12/24 (2009).

In India, there are a number of statutes that deal with sanitation, but none of them define the term ‘sanitation’.⁹ Further, a majority of the legal instruments do not use the term ‘sanitation’ independently; instead they treat sanitation as part of other related subject-matters such as public health and water supply.¹⁰ The National Health Bill 2009 (Draft) was an exception as it used the term ‘right to sanitation’ explicitly and provided a broader definition of sanitation in the human rights context that covered privacy and dignity of individuals as well as the issues of safety in the context of public health and the environment.¹¹ However, the Bill has not seen any progress so far.

At the same time, there are different programmes, schemes and administrative orders related to sanitation that provide a clearer conceptual framework. There are also institutions established under these programmes, schemes and administrative orders. These programmes, schemes, administrative orders along with the institutions created through them are together referred to as the policy framework in this thesis. As per the Total Sanitation Campaign (TSC) Guidelines 2011, sanitation ‘connotes a comprehensive concept which includes liquid and solid waste disposal, food hygiene and personal, domestic as well as environmental hygiene’.¹² The National Urban Sanitation Policy 2008 (NUSP) defines sanitation as ‘safe management of human excreta including its safe confinement, treatment, disposal and associated hygiene related practices’.¹³ While the former—a flagship programme of the Union Government for rural sanitation—adopts a broad inclusive definition, the latter—a policy document guiding sanitation interventions in urban areas—focuses on sanitation from a household and individual perspective. The ongoing SBM also appears to be following a broad definition of sanitation. Even though the SBM Guidelines do not define the term ‘sanitation’ explicitly, they lay down components of sanitation that include

⁹ Statutes relevant to the realisation of the right to sanitation are discussed in Chapter 2.

¹⁰ eg Uttar Pradesh Water Supply and Sewerage Act 1975 and Karnataka Urban Drinking Water and Sanitation Policy 2002.

¹¹ National Health Bill 2009, clause 2 (jj).

¹² Total Sanitation Campaign Guidelines 2011, para 1.2.

¹³ National Urban Sanitation Policy 2008, Background.

several key elements such as access to toilets, privacy and dignity of individuals, and waste management.¹⁴

The concept of sanitation has evolved gradually from a narrow focus on management of human excreta to a comprehensive concept that encompasses important aspects such as privacy, dignity, health dimensions, environmental dimensions and social dimensions. In the contemporary context in India, a narrow definition of sanitation that focuses only on the issue of management of human excreta is clearly out-dated and inappropriate. A wider understanding of sanitation that encompasses all the important aspects such as infrastructural, social and cultural aspects is essential. This thesis articulates such a conceptual framework and analyses the issues and challenges related to the realisation of the right to sanitation on that basis.

B. DIVERSITY AND MAGNITUDE OF SANITATION ISSUES IN INDIA

Sanitation issues have become an important focus of attention both at the international level and at the national level in India. Lack of or inadequate sanitation adversely affects public health and environment and poses challenges for overall social and economic development. The impact of inadequate sanitation on public health is to the extent that globally about 23 per cent of all deaths are due to a few diseases such as diarrhoea, roundworm, whipworm, hookworm, schistosomiasis, and trachoma that are linked to inadequate sanitation.¹⁵ This is understandable given the prevalence of open defecation. According to the recent WHO-UNICEF JMP, in 2015, 39 per cent of the global population (2.9 billion people) used a safely managed sanitation service.¹⁶ The Report further estimates that in 2015, 892 million people worldwide defecated in the open.¹⁷ Lack of sanitation contributes to environmental pollution, mainly water pollution, which

¹⁴ eg Swachh Bharat Mission (Urban) Guidelines 2014, 3.

¹⁵ A Prüss-Üstün and C Corvalán, 'Preventing Disease Through Healthy Environments: Towards an Estimate of the Environmental Burden of Disease' (WHO 2006) 9.

¹⁶ WHO and UNICEF, Progress on Drinking Water, Sanitation and Hygiene: 2017 Update and SDG Baselines (WHO and UNICEF 2017) 27.

¹⁷ *ibid* 4.

may have significant adverse effects on public health, livelihood and economic development. The environmental implications of inadequate sanitation are clear from the fact that approximately 80 per cent of the total wastewater generated globally is discharged into the environment without adequate treatment.¹⁸

Victims of inadequate sanitation are predominantly in developing countries including in South Asia and are mostly children, the poor and the marginalised people.¹⁹ South Asia has recorded significant and rapid improvement in addressing the issue of open defecation. However, the region still houses approximately 65 per cent of the world's open defecators.²⁰ An estimated 80–90 per cent of all wastewater produced in the region is released untreated, which causes environmental pollution and most importantly the pollution of water.²¹ In India, the magnitude and diversity of sanitation issues are higher when compared to other countries in the region probably due to the geographical size of the country, the huge population and social factors such as the patriarchal nature of society and the caste system. Nearly 60 per cent of the global population practicing open defecation lives in India,²² and this constitutes about 90 per cent of the open defecators in South Asia.²³ However, these figures need to be seen in the context of the fact that a significant number of the global population lives in India (around 17 per cent).²⁴

Sanitation issues in India may be broadly summarised into six categories:

First, inadequate toilet facilities and open defecation are important sanitation-related issues in India. According to Census-2011, 53.1 per cent of the households

¹⁸ UN Water, United Nations World Water Development Report—Wastewater: The Untapped Resource (UN Water 2017) 14.

¹⁹ B Fawcett, 'Shit in Developing Cities: A World of Ill Health, Indignity, Violence, and Death' (2016) 115(4) *The South Atlantic Quarterly* 763, 764.

²⁰ UNICEF, 2015 Progress Report—Stop Open Defecation (UNICEF 2015) 8.

²¹ UN Water (n 18) 97.

²² World Bank, Environmental and Social Systems Assessment (ESSA): Swachh Bharat Mission—Gramin (World Bank 2015) 17.

²³ UNICEF (n 20) 8.

²⁴ J Burke, 'Census Reveals that 17% of the World is Indian' *The Guardian* (31 March 2011) <www.theguardian.com/world/2011/mar/31/census-17-percent-world-Indian>.

in India do not have a toilet.²⁵ The situation is worse in rural areas where 69.3 per cent of the households do not have a toilet, whereas in urban areas 18.6 per cent of the households do not have a toilet.²⁶ A recent estimate by the Union Government, however, underlines an improvement in access to toilets to the extent that the percentage of the population defecating in the open has reduced to 52.1 per cent and 7.5 per cent in rural and urban areas respectively.²⁷ The high rate of open defecation in India poses risks for public health and environment. From a public health point of view, open defecation could lead to a number of diseases. A study notes that a gram of faeces could contain ten million viruses, one million bacteria, 1000 parasite cysts and 100 worms.²⁸ The high rate of open defecation in India affects children disproportionately. Open defecation has been highlighted as a reason for childhood stunting and infant mortality in India.²⁹ Open defecation could also lead to faecal contamination of water.³⁰

At the same time, it needs to be underlined that lack of toilets is not the only reason for open defecation in India; social practices and cultural notions also play a crucial role.³¹ For instance, some people may find it unacceptable to have a toilet within or near their houses and in some cases, women may prefer to walk to an open field for defecation as it gives them an opportunity to socialise.

Second, inadequate mechanism for the management of liquid and solid waste is another critical sanitation-related issue in India. Sewage treatment capacity in India is very limited to the extent that only about 20 per cent of the total sewage

²⁵ Government of India, Census of India–2011: Availability and Type of Latrine Facility (Government of India 2011).

²⁶ *ibid.*

²⁷ See Government of India, Swachhta Status Report 2016 (National Sample Survey Office 2016) ii.

²⁸ R George, *The Big Necessity: the Unmentionable World of Human Waste and Why it Matters* (Metropolitan Books 2008) 2.

²⁹ D Spears et al, 'Open Defecation and Childhood Stunting in India: An Ecological Analysis of New Data from 112 Districts', *Plusone* (2013) <<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0073784>>.

³⁰ PTI, 'Open Defecation Polluting Goa Rivers—Report' *The Indian Express* (Panaji 7 June 2017) <<http://indianexpress.com/article/cities/goa/open-defecation-polluting-go-rivers-report-4693025/>>.

³¹ A Gupta et al, 'Revealed Preference for Open Defecation: Evidence from a New Survey in Rural North India' (2014) 49(38) *Economic and Political Weekly* 43.

generated could be treated before discharge.³² This indicates the fact that a large quantity of wastewater is directly discharged into freshwater sources without any treatment or adequate treatment, which is in fact a major cause of water pollution in India.³³ Management of septage has also increasingly emerged as an issue, mostly in urban areas. Around 48 per cent of the households in urban areas use on-site facilities such as septic tanks and pits, which need to be emptied periodically.³⁴ In the absence of any mechanism to manage septage in an environmentally safe manner, people rely on private parties to empty their septic tanks and pits and these private parties discharge the untreated septage directly to the environment.³⁵ Municipal solid waste also raises sanitation-related concerns. According to a recent estimate, India produces around 52 million tonnes of solid waste each year and only around 23 per cent of the total waste generated is processed.³⁶ A huge quantity of solid waste is thus dumped directly into the environment, which adversely affects public health and the quality of the environment.³⁷

Third, certain groups of people face sanitation-related issues more than others. Lack of sanitation disproportionately affects women and girls. For instance, open defecation poses safety-related risks including the risk of sexual violence against women.³⁸ Further, sanitation facilities are likely to increase the workload of women because in a patriarchal society women are made responsible for household work including the task of fetching water for use in toilets among other household uses. Similarly, the elderly and people with disabilities are

³² Ministry of Urban Development, Strategic Plan of Ministry of Urban Development for 2011-2016.

³³ Ministry of Urban Development, Advisory Note: Septage Management in Urban India (Ministry of Urban Development 2013).

³⁴ *ibid.*

³⁵ SK Rohilla et al, 'Urban Shit: Where does it All Go?' *Down to Earth* (1-15 April 2016) <www.downtoearth.org.in/coverage/urban-shit-53422>.

³⁶ S Narain and SS Sambyal, Not in My Backyard: Solid Waste Management in Indian Cities (Centre for Science and Environment 2016) 4.

³⁷ SK Singh and B Jhamnani, 'Groundwater Contamination due to Bhalaswa Landfill Site in New Delhi' (2009) 1(3) *International Journal of Civil and Environmental Engineering* 121.

³⁸ S Lennon, 'Fear and Anger: Perceptions of Risks Related to Sexual Violence Against Women Linked to Water and Sanitation in Delhi, India' (SHARE Briefing Note 2011).

disproportionately affected by the lack of availability of toilets or the lack of availability of toilets which are suitable for their needs.³⁹

Fourth, while lack of sanitation is a concern, certain sanitation interventions also raise similar concerns particularly from an environmental point of view. For instance, an improperly constructed toilet may lead to water pollution as is the case of groundwater pollution due to seepage from unlined toilet pits.⁴⁰ Similarly, the promotion of sanitary napkins may lead to environmental pollution in a context when there is no mechanism to ensure safe disposal of used sanitary napkins and therefore people tend to bury them or burn them.⁴¹

Fifth, the practice of manual scavenging—a practice that involves the removal of human excreta from dry latrines by dalits, mostly women, and carrying it in a basket for disposal—continues in India. According to the Census-2011, there were 7,94,390 dry latrines and 1,68,066 manual scavengers in India.⁴² According to a recent estimate, the number of manual scavengers has come down to 12,737.⁴³ The practice of manual scavenging represents an important social dimension of sanitation issues in India—the link between sanitation and caste. This link leads to the violation of a number of rights including the right to sanitation. On the one hand, dry latrines and the practice of manual scavenging represent an unsafe method of management of human excreta and on the other hand they reflect caste-based exploitation and violence embedded in the sanitation sector in India.

³⁹ WSSCC and FANSA, *Leave No One Behind: Voices of Women, Adolescent Girls, Elderly and Disabled People, and Sanitation Workers* (WSSCC and FANSA 2016).

⁴⁰ PU Megha et al, 'Sanitation Mapping of Groundwater Contamination in a Rural Village of India' (2015) 6 *Journal of Environmental Protection* 34.

⁴¹ M Lekhi, 'Why We Need a Proper Menstrual Waste Disposal System' *The Times of India* (7 August 2016) <<http://blogs.timesofindia.indiatimes.com/Chargesheet/why-we-need-a-proper-menstrual-waste-disposal-system/>>.

⁴² Government of India, Census-2011, Table entitled 'State/UT & Distt-Wise No. of Latrines which are Services Manually or by Scavengers'.

⁴³ S Senthilir, 'Manual Scavenging: An Indelible Blot on Urban Life' *The Hindu* (25 March 2017) <www.thehindu.com/news/national/tamil-nadu/an-indelible-blot-on-urban-life/article17664714.ece>.

Sixth, the violation of the rights of sanitation workers is an important challenge in the context of sanitation in India. An overwhelming majority of sanitation workers in India are dalits who work in most cases without any protective gear and devices. The absence of adequate protection leads to a number of diseases and in some cases even the death of the workers. Comprehensive data on the number of sanitation workers and the issues faced by them is not available. According to some estimates, the number of sewage workers in India would be over one million.⁴⁴ Some studies further underscore that approximately 100 workers die every year in sewers due to the unsafe working environment.⁴⁵ The magnitude of the issue is further clear from the fact that ten sewage workers died in Delhi in five weeks during the months of July and August 2017.⁴⁶ The issue of violation of the rights of sanitation workers exposes the exploitative nature of the sanitation sector in India because it employs some of the marginalised groups in society to carry out sanitation work and forces them to work in an unsafe working environment without any protection and adequate pay. This practice could also be considered as the continuation of the age-old practice rooted in the caste system that allocated all menial jobs to the so-called untouchables.

Overall, sanitation issues in India are multi-layered and multi-dimensional. The lack of infrastructure such as toilets and sewage treatment plants is one aspect of sanitation issues that is technical in nature. At the same time, issues such as the preference for open defecation, gender-based violence in the context of open defecation and manual scavenging highlight the social and cultural dimensions of sanitation that require multipronged interventions.

⁴⁴ Praxis, *Down the Drain: A Study on Occupational and Health Hazards and the Perils of Contracting faced by Sewerage Workers in Delhi* (Praxis 2014) 11.

⁴⁵ D Roy, 'Whose City' *Seminar* (August 2013) <www.india-seminar.com/cd8899/cd_frame8899.html>.

⁴⁶ P Yadav, 'Another Worker Dies in City Drains; 10th Death in 35 Days' *The Times of India* (Delhi 21 August 2017) 1.

II. SANITATION INTERVENTIONS: LAW AND POLICY FRAMEWORK

A. THE TRAJECTORY: FROM PREVENTION OF EPIDEMICS TO A CENTRAL POLICY GOAL

Interventions to address issues and concerns related to lack of sanitation have a long history in India. Alok notes that sanitation and cleanliness were high priorities during the period of the Indus Valley Civilisation and this approach continued even afterwards, for instance during the era of the Vijayanagaram Empire of southern India and during the Maurya and Gupta periods.⁴⁷ At the same time, it is to be noted that the notions of purity and cleanliness in India were not limited to physical conditions. They were equally applied to human beings, particularly against people in the lower strata of the caste hierarchy. The notions of purity and cleanliness in the context of the caste system have led to the practice of untouchability and allocation of menial jobs such as manual scavenging and leather work to people belonging to lower castes, mainly dalits.⁴⁸

The origin of the modern sanitation system dates back to the early 19th century in Western Europe, particularly in the context of industrialisation, urbanisation and the consequent public health crisis in Britain. Insanitation and consequent epidemics led the government in Britain to focus on sanitation. The cholera epidemic of 1832 and the ‘Great Stink’ of 1858 in London are the often-cited instances that paved the way for massive investment in sanitation infrastructure by the government.⁴⁹ Some commentators even cite this history of focus on epidemics as a reason why sanitation interventions continue to focus on epidemics

⁴⁷ K Alok, *Squatting with Dignity: Lessons from India* (Sage 2010) 17-18.

⁴⁸ G Shah et al, *Untouchability in Rural India* (Sage 2006) 26, 106.

⁴⁹ V Prashad, ‘The Technology of Sanitation in Colonial Delhi’ (2001) 35(1) *Modern Asian Studies* 113, 114; L Mehta, ‘Introduction: Why Shit Matters: Community-led Total Sanitation and the Sanitation Challenge for the 21st Century’ in L Mehta and S Movik eds, *Shit Matters: The Potential of Community-Led Total Sanitation* (Practical Action Publishing 2011) 1.

and diseases even in the 21st century and neglect other dimensions, for instance the environmental dimensions.⁵⁰

The history of sanitation in British India arguably began with the reports of the Royal Commission of 1859.⁵¹ Water borne diseases, mainly cholera, were the major impetus for sanitation initiatives. The plague epidemic in the late 19th century and the early 20th century in the provinces of Bombay and Calcutta was also a key driving force for the colonial government to focus on sanitation initiatives in India.⁵² Thus, sanitation police forces were set up to improve sanitation in military areas. Sanitary departments were also set up in each province by the end of 1870s, which were eventually merged into local bodies with the enactment of the Local Self-Government Act 1885.⁵³ The focus of sanitation interventions was not limited to urban areas. For instance, the Bombay Village Sanitation Act 1889 provided for the setting up of sanitary committees and sanitary boards in villages with powers to frame rules to maintain sanitation.⁵⁴ Violation of these rules was a punishable offence under the Bombay Village Sanitation Act 1889.⁵⁵

However, the major objective of sanitation interventions was not the promotion of public health and environmental quality in general; instead their purpose was to protect British citizens in India and other officials who worked for the British Government. As a result, sanitation interventions were implemented mainly in cantonment areas and areas where British citizens and government officials lived.⁵⁶ The political economy of sanitation interventions during the colonial period is further clear from the fact that there was little focus on maintenance of

⁵⁰ L Feris, 'The Human Right to Sanitation: A Critique on the Absence of Environmental Considerations' (2015) 24(1) Review of European Community and International Environmental Law 16, 17.

⁵¹ MU Mushtaq, 'Public Health in British India: A Brief Account of the History of Medical Services and Disease Prevention in Colonial India' (2009) 34(1) Indian Journal of Community Medicine 6; S Chaplin, *The Politics of Sanitation in India: Cities, Services and the State* (Orient Longman 2012) 4.

⁵² Chaplin (n 51) 45.

⁵³ Mushtaq (n 51).

⁵⁴ Bombay Village Sanitation Act 1889, ss 8 and 19.

⁵⁵ *ibid* s 36.

⁵⁶ Chaplin (n 51) Ch 1.

sanitation-related infrastructure and the colonial government widely employed the existing manual scavenging community for this purpose, which led to the institutionalisation of the practice of manual scavenging in India.⁵⁷ This exploitative approach continues even now in India and the issue is discussed in detail in Part III of this thesis.

Sanitation interventions continued in independent India and they were covered under the housing and health sectors in the first two decades after independence.⁵⁸ As a result, the focus was on toilets and sewerage systems primarily from a health angle. Subsequently, sanitation was considered along with water supply and this led to significant attention being diverted to water supply.⁵⁹ The approach of neglect continued till the mid-1980s. For instance, the Twenty Point Programme introduced during the fifth Five Year Plan (1974-79) did not include sanitation explicitly. Sanitation was subsumed under related sectors such as health, housing and water supply (all these sectors were explicitly mentioned in the Twenty Point Programme). Sanitation was included under health even when the programme was restructured in 2006.⁶⁰ Overall, at the policy level, sanitation was treated as part of other relevant sectors in the first couple of decades after independence.

A change in the approach began in the 1980s with the adoption of the Integrated Low Cost Sanitation Scheme in 1980 in the urban context and the Central Rural Sanitation Programme (CRSP) in 1986 in the rural context. Since then, sanitation has received separate policy attention from time to time.⁶¹ In addition, sanitation is now an explicit component of different development and infrastructure schemes.⁶² From a policy point of view, sanitation has travelled a long distance from neglect to becoming one of the central focuses of the Union Government and

⁵⁷ Prashad (n 49) 126.

⁵⁸ Planning Commission of India, *India-Assessment 2002: Water Supply and Sanitation* (Planning Commission of India 2002) 19.

⁵⁹ *ibid.*

⁶⁰ See Annexure I-III, in Government of NCT of Delhi, *The Twenty Point of Programme 2006—Annual Report 2012-13* (Government of NCT of Delhi 2013).

⁶¹ eg *Guidelines for Swachh Bharat Mission (Urban) 2014*; *Swachh Bharat Mission (Gramin) Guidelines, 2014*.

⁶² eg *Atal Mission Rejuvenation and Urban Transformation—Mission Statement and Guidelines 2015*; *Smart City—Mission Statement and Guidelines 2015*.

state governments as well as inter-governmental and non-governmental organisations.

B. REGULATION OF SANITATION INTERVENTIONS

The increasing focus on sanitation issues at the global level and at the national level in India has led to the emergence of a rights-based approach to sanitation. This is understandable given the link between sanitation and the realisation of a number of rights such as the rights to health, water, environment and education. A more specific development in this regard is the emergence of a distinct right to sanitation.

In India, there is a complex web of constitutional provisions, statutes and policies that are relevant for an examination of the realisation of the right to sanitation. The higher judiciary (Supreme Court of India and high courts) has interpreted the fundamental right to life under the Constitution of India to include the right to sanitation.⁶³ In the early 1980s, the higher judiciary in India recognised the right to sanitation as a derivative fundamental right.⁶⁴ There are also statutes that recognise the right in sanitation in a limited sense, most importantly a right to access to toilets.⁶⁵ At the international level, there are a few international treaties that focus on specific contexts such as the rights of women and prisoners of war and recognise the right to sanitation along with other rights.⁶⁶ A more direct recognition of a distinct right to sanitation can be found in soft law instruments adopted under the auspices of the United Nations including resolutions of the United Nations General Assembly.⁶⁷

The emergence of a distinct right to sanitation necessitates the re-imagination of the existing statutory and policy framework related to sanitation in the context of

⁶³ eg *Virender Gaur v State of Haryana* (1995) 2 SCC 577 (Supreme Court of India).

⁶⁴ See *Municipal Council, Ratlam v Shri Vardhichand* (1980) 4 SCC 162 (Supreme Court of India).

⁶⁵ See chapter 2 of this thesis.

⁶⁶ eg Convention on the Elimination of All Forms of Discrimination against Women, UN Doc A/RES/34/180 (18 December 1979) art 14.

⁶⁷ eg UN General Assembly Resolution—the Human Right to Water and Sanitation, UN Doc A/64/L.63/Rev.1 (26 July 2010).

the realisation of the right. This is important in a context when a significant part of the legal framework was adopted before the emergence of the right to sanitation. Further, some of the recent laws and policies fail to recognise the right to sanitation although they have been adopted after the formal recognition of the right to sanitation. This scenario reveals a parallel and un-connected development of the right to sanitation on the one hand and the statutory and policy framework that regulates sanitation interventions on the other hand.

1) Statutory framework

The Constitution of India vests the power to enact laws on sanitation with state governments.⁶⁸ As a result, there exist a wide variety of statutes applicable to different states. Within states, the implementation of sanitation interventions is the responsibility of local bodies in rural and urban areas both through their constitutive statutes⁶⁹ and through constitutional provisions.⁷⁰ Thus, laws establishing local bodies in rural and urban areas constitute an important part of the statutory framework. In addition, some state governments have adopted separate laws to set up state-level institutions to implement and regulate water supply and sanitation interventions.⁷¹

Sanitation is an issue with multiple dimensions and therefore there are laws that regulate certain specific aspects of sanitation. Environmental laws address some aspects of sanitation such as the regulation of disposal of industrial effluents and wastewater. Thus, the Water (Prevention and Control of Pollution) Act 1974 and the Environment (Protection) Act 1986 are very relevant to examine the realisation of the right to sanitation. The statute that prohibits manual scavenging is also relevant because it prohibits one of the worst methods of management of human excreta—the practice of manual scavenging.⁷²

⁶⁸ Constitution of India 1950, List II, Entry 6.

⁶⁹ eg Uttar Pradesh Panchayati Raj Act 1947, s 15.

⁷⁰ Constitution of India 1950, arts 243G and 243W.

⁷¹ eg Uttar Pradesh Water Supply and Sewerage Act 1975.

⁷² Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013 and Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993.

The statutory framework concerning sanitation consists of a number of statutes with varying scope and application. It follows a geographical approach as well as an issue-based approach. The existence of a separate statutory (and institutional) framework for urban and rural sanitation represents the geographical approach. Similarly, some laws are adopted at the Union level and are applicable to the whole country, whereas others are state laws and they are applicable only to the concerned state. Environmental laws and laws relating to manual scavenging demonstrate the issue-based approach of the statutory framework relating to sanitation in India.

2) Policy framework

In addition to constitutional provisions and statutes, the policy framework also plays an important role in designing and regulating sanitation interventions. In principle, the policy making power is available to both the Union Government and state governments. In practice, the policy framework adopted by the Union Government predominantly regulates sanitation interventions mainly because the Union Government provides the major part of the funds for their implementation.

The policy framework related to sanitation consists of a number of instruments and guidelines of varying scope, nature and application. From a sectoral point of view, there are different frameworks for rural and urban sanitation. For instance, the ongoing SBM has introduced two sets of guidelines for rural and urban sanitation—Swachh Bharat Mission (Gramin) Guidelines 2014 and Swachh Bharat Mission (Urban) Guidelines 2014 respectively. From an administrative point of view, there are different frameworks at the level of the Union Government⁷³ and state governments⁷⁴.

The policy framework, particularly the framework adopted by the Union Government, is extremely relevant in examining the concept and the realisation of the right to sanitation in India because, in practice, it determines the conceptual boundaries and implementation strategies. Implementing agencies at the state-

⁷³ eg Swachh Bharat Mission (Gramin) Guidelines 2014.

⁷⁴ eg Punjab Rural Water Supply and Sanitation Policy 2014.

level and at the local-level primarily follow the norms, standards and strategies prescribed under the policy framework. They hardly take into consideration the relevant statutory and constitutional provisions.

The Union Government has been providing financial assistance to state governments to implement sanitation interventions for the last several decades through various programmes, the most recent being the SBM. The major focus has been to promote the construction and use of toilets at the household level. However, these responses are programmatic in nature and they are not based on an understanding of sanitation as a matter of right and duties emanating from the Constitution of India and different statutes. This approach continues despite the fact that sanitation has been recognised as a fundamental right by the higher judiciary in India since the 1980s and subsequently by the United Nations at the international level.

III. CONCEPTUAL FRAMEWORK

Human rights are regarded as rights held by individuals by virtue of being part of the human species regardless of their economic and social status and they are universal in nature.⁷⁵ Over the years, the scope of human rights has expanded to include collective rights, which is also known as ‘third generation rights’.⁷⁶ One of the key objectives of human rights is to uphold human dignity. Owing to this reason, they are considered a key feature of constitutionalism and regarded as morally and normatively superior form of rights.⁷⁷

⁷⁵ MR Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Orient Blackswan 2004) 3.

⁷⁶ See P Jones, ‘Human Rights, Group Rights and Peoples’ Rights’ (1999) 21(1) *Human Rights Quarterly* 80. For a discussion on collective rights as hybrid rights, see R Freedman, ‘Third Generation’ Rights: is There Room for Hybrid Constructs Within International Human Rights Law?’ (2013) 2(4) *Cambridge Journal of International and Comparative Law* 935.

⁷⁷ LE Weinrib, ‘Constitutionalism in the Age of Rights: A Prolegomenon’, (2004) 121 *South African Law Journal* 278, 285.

Socio economic rights (SERs) are a key part of human rights as recognised in international law and in India.⁷⁸ They seek to ensure that people's basic needs are met and thereby they are able to enjoy and utilise their potential and abilities to the maximum extent possible. The Supreme Court of India has followed a similar line of interpretation when it expanded the scope of the right to life enshrined in the Constitution of India to include all basic necessities of life.⁷⁹ Thus, according to Edwin, SERs cover potentially the whole range of citizen's social and economic experience which presumably includes concerns related to education, health and housing among other things.⁸⁰

According to Baxi, a 'new age of human rights' has begun in the second half of the 20th century which is marked by the emergence of several new human rights which are in fact a translation of basic needs into fundamental human rights.⁸¹ He further underlines that the 'new age of human rights' also 'signifies the power of human and social suffering and struggle to name and pursue the daring enunciation of new human rights previously unimagined worldwide'.⁸²

The emergence of the right to sanitation as a distinct human right is part of the expansion of human rights to address people's sufferings and struggles. This is particularly relevant for the developing world because an overwhelming majority of the people who are suffering due to lack of adequate sanitation is living in the developing world. The suffering in this context includes most importantly health implications, environmental pollution, implications for dignity and privacy of individuals and inequality.⁸³ The implications are both at the level of individuals and society at large.

⁷⁸ See eg International Covenant on Economic Social and Cultural Rights 1966

⁷⁹ See eg Francis Coralie Mullin v The Administrator (1981)1 SCC 608 (Supreme Court of India).

⁸⁰ KD Ewing, 'The Case for Social Rights' in T Campbell et al eds, *Protecting Human Rights: Instruments and Institutions* (Oxford University Press 2003) 323, 325,

⁸¹ U Baxi, 'The Human Right to Water: Policies and Rights' in R Iyer ed., *Water and the Laws in India* (Sage 2009) 149.

⁸² *ibid.*

⁸³ See WHO et al, Progress on Drinking Water, Sanitation and Hygiene: 2017 Update and SDG Baselines (WHO 2017).

While the idea of human rights has been advanced as an important step towards addressing suffering and struggles of people particularly in the developing world, there has been considerable criticism levelled against the making and implementation of human rights. According to Baxi:

...we ought to note that not all forms of human violation stand addressed by the languages of human rights. Nor do all violated people have equal access to the languages of human rights; having access to a growingly common human rights language is not the same thing as marshalling the sure power to name and redress human violation...human rights language forever promise more than they deliver in real terms to the 'wretched of the Earth'.⁸⁴

Thus, critique points to the inadequacy of the human rights talk or language to eliminate structural violence and material inequality which in effect affects the marginalised particularly in the developing world.⁸⁵ Everyday experience of suffering by the marginalised such as the poor, women, lower caste people has received little or no attention in the human rights talk and therefore there is a significant distance between 'norm enunciation and human suffering'.⁸⁶ Further, social, economic and legal marginalisation systematically naturalise the suffering and exploitation so that the victims themselves begin to internalise the suffering which diminishes the scope of resistance from within.⁸⁷

Overall, the critique seems to highlight the influence of geopolitical, social and economic power on the making and implementation of human rights. The critique also highlights the systematic way in which the issues and needs of the poor and the marginalised are kept away from law and policy interventions to promote the realisation of human rights due to the influence of prevailing power relations and structural violence. This thesis uses this critical approach to human rights as the framework to analyse the law and policy framework related to sanitation in India from a right to sanitation perspective.

⁸⁴ U Baxi, *The Future of Human Rights* (Oxford University Press, 3rd edn 2008) 2.

⁸⁵ VS Peterson, 'Whose Rights? A Critique of the "Givens" in Human Rights Discourse' (1990) 15(3) *Alternatives: Global, Local, Political* 303, 306.

⁸⁶ Baxi (n 84) 100.

⁸⁷ L Mehta, 'Why Invisible Power and Structural Violence Persist in the Water Domain' in M Oosterom and P Scott-Villiers eds, *Power, Poverty and Inequality* (IDS Bulletin, Vol 47, No 5, 2016) 31.

The influence of different social and economic factors on people's everyday experience of sanitation-related suffering (or denial of rights) is well documented. For instance, in India, caste continues to be a dominant factor that leads to the allocation of sanitation work to dalits and other lower caste people. Caste is also a key factor that contributes to the non-making, or non-implementation, of laws to protect rights of sanitation workers.⁸⁸ Similarly, sanitation-related experience of women and girls has received little or no policy attention which leads to violation of the right to sanitation and many other rights of women and girls.⁸⁹ Studies have also highlighted the disproportionate impact of wastewater on the urban poor⁹⁰ and the denial of sanitation facilities to people living in the so-called informal urban settlements⁹¹ and pavements⁹². These studies highlight the complex interplay of various social, economic and cultural factors which individually and cumulatively aggravates sanitation and related experiences of the poor and the marginalised. They also raise concerns of injustice in the sanitation sector in India and its implications for the realisation of several human rights including the right to sanitation as well as environmental sustainability.

The social and cultural factors are also likely to affect the implementation of laws and access to justice. The ruling class in India is generally constituted of high caste, upper class men⁹³ which may lead to framing of laws and policies that are myopic to the needs, concerns and suffering of the lower caste, women and the poor. Narula highlights a concern that law enforcement machineries in India is dominated by upper caste individuals and this led to the implementation of the rules of caste rather than rules of law.⁹⁴ She further argues that the presence of

⁸⁸ S Narula, 'Equal by Law, Unequal by Caste: the "Untouchable" Condition in Critical Race Perspective' (2008) 26(2) Wisconsin International Law Journal 255.

⁸⁹ S Kulkarni et al, 'No Relief: Lived Experiences of Inadequate Sanitation Access of Poor Urban Women in India' (2017) 25(2) Gender and Development 167.

⁹⁰ T Karpouzoglou and A Zimmer, 'Ways of Knowing the Wastewaterscape: Urban Political Ecology and the Politics of Wastewater in Delhi, India' (2016) 54 Habitat International 150.

⁹¹ C McFarlane, 'Sanitation in Mumbai's Informal Settlements : State, 'Slum' and Infrastructure' (2008) 40(1) Environment and planning 88.

⁹² D Joshi and J Morgan, 'Pavement Dwellers' Sanitation Activities: Visible but Ignored', (2007) 25(3) Waterlines 19.

⁹³ A Kumar, 'Understanding Lohia's Political Sociology: Intersectionality of Caste, Class, Gender and Language' (2010) 45 (40) Economic and Political Weekly 64, 66.

⁹⁴ Narula (n 88) 305.

legislation and constitutional provisions have helped to mask the violation of human rights faced by dalits on a daily basis as opposed to curb the violation as is expected from laws in theory.⁹⁵ Studies have also highlighted the fact that criminal cases involving violence against dalits are generally rejected at a very early stage on technical grounds and as a result not many cases reach the court or end up in punishing the offenders.⁹⁶ These issues are pertinent in the context of sanitation in India particularly to explain why sanitation-related needs and concerns of marginalised people such as women, the poor and dalits continue to be ignored despite the presence of statutes and constitutional provisions.

This thesis analyses the conceptualisation and implementation of the right to sanitation in India with the help of this conceptual framework. More specifically, it looks at the conceptualisation and implementation of the right to sanitation in India from, and through the intersection of, four angles—gender, environment, caste and labour.

IV. RATIONALE, SCOPE AND LIMITATIONS

Sanitation issues in general and particularly in developing countries have been a focus of academic research for long.⁹⁷ A majority of the available research focuses on the issues of open defecation and access to toilets.⁹⁸ There is also literature that analyses the issues from a law, policy and governance perspective in relation to particular aspects of sanitation such as gender issues,⁹⁹ manual scavenging¹⁰⁰, issues related to sanitation workers,¹⁰¹ and MHM.¹⁰² Certain

⁹⁵ ibid 257.

⁹⁶ eg S Khora, 'Final Report under Sec-498A and the SC/ST Atrocities Act' (2014) 49(41) Economic and Political Weekly 17.

⁹⁷ eg M Black and B Fawcett, *The Last Taboo: Opening the Door on the Global Sanitation Crisis* (Earthscan 2008) and Chaplin (n 51).

⁹⁸ eg Gupta et al (n 31) and AK Jain, *Right to Toilet: A Roadmap for Total Sanitation* (Readworthy 2014).

⁹⁹ eg JAGORI, Women's Rights and Access to Water and Sanitation in Asian Cities (JAGORI 2011); UN HABITAT, Navigating Gender: in Development of Water and Sanitation in Urban Areas—A Rapid Gender Assessment of the Cities of Bhopal, Gwalior, Indore and Jabalpur in Madhya Pradesh, India (UN HABITAT 2006).

¹⁰⁰ eg G Ramaswamy, *India Stinking: Manual Scavengers in Andhra Pradesh and their Work* (Navayana 2005); B Singh, *Unseen: the Truth about India's Manual Scavengers* (Penguin 2014).

approaches to sanitation have also been the focus of academic research from a policy and governance perspectives. For instance, the CLTS approach, which has influenced to some extent the reforms in the rural sanitation sector in India, has been a subject-matter for academic research.¹⁰³

However, there is limited academic work that analyses sanitation in a holistic manner with a focus on sanitation-related issues and challenges in India. Further, sanitation was an unfamiliar territory for law researchers until recently, which is exemplified by the fact that there are very few academic works that focus on the legal aspects of sanitation,¹⁰⁴ and there is almost no work that focuses on the right to sanitation in India.¹⁰⁵ Most importantly, there is no legal scholarship yet that analyses the conceptual framework pertaining to the right to sanitation in India and examines issues and challenges for the realisation of the right to sanitation. In this context, this thesis aims to make the following contributions:

First, the conceptualisation of the right to sanitation has been myopic to a number of critical issues related to sanitation in India, for instance, the issues of manual scavenging and lack of safety for sanitation workers. In this context, this thesis articulates a conceptual framework that includes all the important dimensions of the right to sanitation relevant in the Indian context.

Second, the existence of the right to sanitation in India is based on its recognition by the higher judiciary through case law. While the case law recognise the right, it

¹⁰¹ eg T Shinoda, *Marginalization in the Midst of Modernization: Sweepers in Western India* (Manohar 2005); Praxis (n 44).

¹⁰² eg I Winkler and V Roaf, 'Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality' (2015) 21(1) Cardozo Journal of Law & Gender 1; S Yasmin et al, 'Menstrual Hygiene Among Adolescent School Students: An In-Depth Cross-Sectional Study in an Urban Community of West Bengal, India' (2013) 5(6) IOSR Journal of Dental and Medical Sciences 22.

¹⁰³ eg L Mehta and S Movik eds, *Shit Matters: The Potential of Community-Led Total Sanitation* (Practical Action Publishing 2011).

¹⁰⁴ eg I Winkler, 'The Human Right to Sanitation' (2016) 37(4) University of Pennsylvania Journal of International Law 1331; K Ellis and L Feris, 'The Right to Sanitation: Time to Delink from the Right to Water' (2014) 36 Human Rights Quarterly 607.

¹⁰⁵ There seems to be only one work that discusses explicitly on the right to sanitation with a focus on India, however it does not examine the complexities and nuances of the right in the Indian context. See RM Coleman, 'The Human Right of Sanitation for All: A Study of India' (2011) 24 Pacific McGeorge Global Business and Development Law Journal 267.

does not provide the details of the bases, scope and content of the right. This thesis examines the scope and content of the right to sanitation in the Indian context. It also explains the need for re-imagining the scope of the right to sanitation at the international level in the light of the law and policy developments in India so that it reflects the needs and concerns related to sanitation in developing countries.

Third, there are a number of statutes that address sanitation issues from different angles. Many of these statutes follow a language developed at a time when sanitation was not a serious matter of concern or only some aspects of sanitation such as cleaning of streets and market places were matters of concern. In this context, this thesis undertakes a mapping of existing statutes that are relevant in understanding the nature of the right and examines their contribution to the realisation of the right to sanitation. It further emphasises the need to re-read or re-imagine the existing statutes in the light of the right to sanitation and in the light of existing and emerging sanitation issues in India.

Fourth, the policy framework predominantly regulates sanitation interventions in India. In this context, this thesis examines to what extent the policy framework recognises the right to sanitation and contributes to the realisation of the right as understood in the context of the Constitution of India. This thesis also examines the nature of the relationship between the policy framework and the statutory framework and further examines the implications of the policy framework for the realisation of the right to sanitation.

Fifth, the link between the right to sanitation on the one hand and caste, gender and class on the other hand needs an in-depth examination because discrimination and oppression based on caste, class and gender are social realities in which the implementation of the right to sanitation takes place. In this context, this thesis examines the role played by caste, class and gender in the realisation of the right to sanitation in the light of conceptual and empirical research.

In a nutshell, this thesis examines the nature and scope of the right to sanitation in India from a law and policy perspective. It examines the way in which the right to

sanitation has been articulated in India and the extent to which the law and policy framework has addressed challenges to the realisation of the right to sanitation. More specifically, this thesis analyses how, and to what extent, factors such as caste, class and gender determine, influence or violate the realisation of the right to sanitation and other rights such as the rights to health, water, environment, education and equality. In this regard, this thesis is a significant contribution to the literature on sanitation in general and the literature on sanitation from a legal perspective in particular. This thesis is the first of its kind in terms of its focus on the right to sanitation in India.

Sanitation issues in India are complex both in terms of the multi-dimensional nature of sanitation and the administrative structure within which sanitation issues are addressed. Thus, a thesis does not provide adequate space and time to cover all the substantive issues and geographical areas. As a result, this thesis leaves open certain areas and issues that require further research. Most importantly, the empirical base of the analysis in this thesis is the fieldwork conducted in rural areas in three states (Kerala, Rajasthan and Uttar Pradesh). Therefore, the analysis in this work may not fully reflect all issues and concerns in other states in general and in the urban sanitation context in particular, which can be a topic of future research. Further, this thesis is a qualitative study and therefore, there is scope and need for further research that tests the analysis and observations in this thesis in the light of micro-level quantitative studies. This is particularly relevant in a context when sanitation issues and challenges are shaped by a number of local-level factors such as the local culture, availability of natural resources such as land and water, climatic conditions and the local economy.

The scope of judicial and administrative enforcement of the right to sanitation is another issue that needs to be further investigated. The absence of specific entitlements in the statutory and policy framework has led individuals and organisations to rely on the fundamental right to life guaranteed under the Constitution of India to approach the higher judiciary to enforce their right. While this can be an option, the actual scope and limitations of this option are not yet clear. Even though there are academic works that examine the scope of

constitutional remedies in realising socio-economic rights in India,¹⁰⁶ similar work has not yet been undertaken in the specific case of the right to sanitation. Thus, there is a need to critically examine the issues related to the enforcement of socio-economic rights in India in the light of cases on the right to sanitation. This could be a subject-matter for a separate academic enquiry in the context of right to sanitation in India.

V. METHODOLOGY

This thesis adopts the socio-legal method and the intersectional approach to explain the conceptualisation and realisation of the right to sanitation in India. The main objective of this thesis is to examine how different social, cultural and legal factors impact or facilitate a broader conceptualisation and effective implementation of the right to sanitation with a particular focus on the poor and the marginalised such as women, dalits and the poor.

This thesis follows a method that combines a literature review with fieldwork. It begins with the building of a conceptual framework on the right to sanitation based on an understanding of different aspects of sanitation and related issues in India and then proceeds to examine the framework for implementation. It relies on the Census of India, the *Swachhta Status Report 2016* and other data sources including the WHO/UNICEF Joint Monitoring Project 2017 for primary data on sanitation scenario at the national level and state levels. It relies on various relevant law and policy documents at the international level and national level in India to explain the existing understanding of the right to sanitation. This thesis goes a step ahead and draws a conceptual framework that includes not only the issues and concerns explicitly recognised in the existing law and policy framework but also other key issues which the author believes to be the essential aspects of the right to sanitation in the Indian context.

¹⁰⁶ eg M Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8(4) *International Journal of Constitutional Law* 739; M Tushnet, 'Reflections on Judicial Enforcement of Social and Economic Rights in the Twenty-First Century' (2011) 4 *NUJS Law Review* 177.

The available primary data and secondary literature are not adequate to understand and explain the different mitigating and aggravating factors relevant in the context of conceptualisation and realisation of the right to sanitation in India. Therefore, this thesis depends on fieldwork to fill the gap. The fieldwork for this research was conducted during the period 2014-16. This thesis has chosen to focus mainly on rural sanitation mainly because rural sanitation issues have received little attention from academic researchers working on legal aspects. Further, it was not practically not possible to conduct fieldwork in urban areas as well in the limited time period available during this research.

Fieldwork was conducted in selected districts in three states —Kerala, Rajasthan and Uttar Pradesh—during the period 2014-16. These states were selected on the basis of their relevance in terms of the sanitation scenario and sanitation-related issues and challenges. These states provide a contrasting sanitation scenario and at the same time they provide a cross-section of sanitation issues in the country. The sanitation scenario (and broadly the socio-economic scenario) is much better in Kerala. For instance, it is one of the very few ODF states in India.¹⁰⁷ Rajasthan and Uttar Pradesh represent two worst-case scenarios with the presence of all issues relating to sanitation such as open defecation and manual scavenging.¹⁰⁸ Rajasthan is also relevant in the sanitation context because it is one of the driest states in the country and most of the sanitation interventions in India are water-based. Districts within each state were selected based on the same criteria.

Four districts in the State of Kerala were selected for fieldwork—Ernakulam, Kannur, Thiruvananthapuram and Wayanad. Ernakulam is one of the important districts in central Kerala, which is relevant in the sanitation context mainly because of controversies relating to disposal of septage. This district is also relevant because the first septage treatment plant in the State has been built in this

¹⁰⁷ Government of India, Kerala Declared Open Defecation Free (Press Information Bureau 1 November 2016).

¹⁰⁸ Ministry of Statistics and Programme Implementation, Drinking Water, Sanitation, Hygiene and Housing Condition in India (National Sample Survey Office 2014) 39; S Ediga, 'Manual Scavenging in India: 86% of All the Manual Scavengers in the Country are in Uttar Pradesh' *Factly* (10 May 2015) <<https://factly.in/manual-scavenging-in-india-8-pc-manual-scavengers-are-in-uttar-pradesh/>>.

district (Brahmapuram) and this has triggered local protest. Kannur is relevant in the sanitation context because it is one of the best performing districts in the State as far as toilet coverage is concerned. In addition, Kannur has been in the limelight for significant achievements in the sanitation sector in some panchayats, for example the first ODF block (Thalassery Block) in the State is in Kannur. Thiruvananthapuram is relevant in the sanitation context for various reasons. While it is relevant because of its status as the state capital, the district has seen in the past one of the most controversial sanitation conflicts in the context of waste disposal. The district of Wayanad is important to study the issues related to the realisation of the right to sanitation from the perspective of the marginalised as this is the district with the highest Scheduled Tribe population in the State.

Four districts in the state of Rajasthan were selected for fieldwork—Bikaner, Churu, Jaipur, and Tonk. Bikaner and Churu are relevant in a context of considerable success in the implementation of the policy framework for rural sanitation. The district administration in these districts took a keen interest in achieving ODF status. Jaipur is the state capital and the district with the highest population density. Tonk is one of the worst performing districts in the State in terms of implementation of sanitation interventions. It is ranked thirty-second (out of the 33 districts in the State of Rajasthan) on the basis of its performance in the sanitation sector. Tonk also faces the specific challenge of being a water-logged area.

Four districts in the State of Uttar Pradesh were selected for fieldwork—Chitrakoot, Kushinagar, Lucknow and Pratapgarh. The sanitation scenario in all the four districts is abysmal. In addition, Chitrakoot district lies in the drought-prone Bundelkhand region, which makes it relevant to examine issues and challenges related to the realisation of the right to sanitation. The districts of Kushinagar and Pratapgarh are two of the most backward districts of the country. Pratapgarh is also relevant in the context of its proximity to river Ganga—one of the largest rivers in India. Lucknow is the state capital and the district with the highest population density. Further, Lucknow houses the highest number of Scheduled Caste population in rural areas in the State.

The purpose of the fieldwork was to provide qualitative inputs to the research, mainly to understand opinions and perspectives of, and everyday experience as well as challenges faced by, both the right-holders and duty-bearers in the context of realisation of the right to sanitation. Representatives of key agencies responsible for implementing different aspects of the right to sanitation were interviewed by following the semi-structured interview method (see annexure 1 for the set of questions asked during fieldwork). The agencies in this regard include state level and district level agencies that implement sanitation and related programmes and schemes such as the Swachh Bharat Mission and the National Rural Health Mission as well as agencies that are relevant for certain specific dimensions of the right to sanitation, for instance the State Pollution Control Board.

The key purpose of this part of the fieldwork was to gather information on if, and to what extent, implementing agencies understood sanitation as a matter of right and to understand different strategies they followed to achieve sanitation goals as well as to understand challenges faced by them. In many cases, it was found impossible to get a prior appointment to meet officials, therefore the strategy of visiting different offices without notice was followed. While this has the disadvantage of not being able to meet certain specific officials particularly at the state level, it has advantages as well of being able to meet certain other officials who are relevant to the research, but would not have met otherwise.

Similar approach was followed to interact with NGOs and activists working on sanitation and related issues in states chosen for the fieldwork. The key purpose of meeting representatives of NGOs was to understand critical reflections from their experience with both implementing agencies and right-holders. While information on certain key NGOs such as WaterAid were collected prior to the fieldwork, efforts were also made to gather information about and meet other local level NGOs during the fieldwork.

The strategies of semi-structured interviews and focus group discussions was followed to interact with right-holders. Villages to be visited were selected on the basis of the sanitation scenario. Thus, a few of the so-called well performing

villages and worst-performing villages were selected for the visit. However, in certain cases such a decision was also made or altered in the light of the information received from state level or district level offices, NGO representatives and activists. The fieldwork in villages followed a special focus on the poor and the marginalised people to understand the extent to which the right to sanitation has been realised for them or not. Thus, a special attention was paid to understand issues and concerns of women and dalits. For instance, efforts were made to visit harijan and tribal colonies as well as to talk to women and sanitation workers. Similarly, a special effort was made to interview women village heads to understand if such a factor makes any difference to the realisation of the right to sanitation particularly for women.

Mainly two strategies were applied to get access to people and places. First, wherever possible, local level NGOs or activists were contacted to facilitate the access. Second, access was obtained by directly approaching people and village panchayat officials. However, both the strategies were found qualitatively not different, although the former strategy was found more effective to get access to the poor and the marginalised communities because they are otherwise invisible or they generally live in isolation in places far away from other communities.

VI. OUTLINE OF THE THESIS

This thesis analyses the law and policy framework related to sanitation in India from a right to sanitation point of view. This thesis consists of seven chapters in addition to the introductory and concluding chapters and each chapter addresses distinct but closely interconnected issues and questions. The chapters of this thesis are divided into three parts.

Part I consists of three chapters. The first chapter examines the development of a distinct right to sanitation, explains the concept of the right to sanitation as developed in India and at the international level, and analyses the extent to which the framework at the national and international levels interact with each other. This chapter presents a holistic conceptual framework of the right to sanitation that includes all important dimensions of sanitation issues in India.

The existence of the right to sanitation is based on its recognition by the higher judiciary through case law, which falls short of providing the bases, scope and content of the right. At the same time, there are statutes and policies that directly or indirectly contribute to the realisation of the right to sanitation regardless of the fact that an overwhelming majority of them do not recognise the right explicitly. In this context, the second chapter describes the existing statutory and policy framework relevant in the context of recognition and realisation of the right to sanitation.

The policy framework has been predominantly regulating sanitation interventions in India partly due to the ambiguous or indeterminate nature of the statutory framework and partly due to the fact that the policy framework has been the major source of funding for state governments to implement sanitation interventions. Therefore, the policy framework has become the most important framework in the context of implementation of sanitation interventions. Thus, the third chapter examines the policy framework from a right to sanitation perspective. This chapter overwhelmingly relies on information collected through fieldwork due to the non-existence of academic work on implementation of sanitation interventions from a legal or right to sanitation perspective. Therefore, this chapter focuses on rural areas.

Parts II and III examine four specific issues or dimensions of the right to sanitation in the Indian context. Women are particularly affected by both the availability and non-availability of sanitation facilities. Sanitation interventions are closely linked to the realisation of the right to environment. However, both these aspects have met with severe neglect particularly from implementing agencies. In this context, Part II examines the gender and environmental dimensions of the right to sanitation in chapters four and five respectively.

Part III consists of two chapters that focus on caste and labour dimensions of the right to sanitation. In India, the handling of human excreta and waste in general are regarded as a menial job mainly due to the link between sanitation and caste. As a result, sanitation work is allotted to people from the lowest section of the caste hierarchy, that is, dalits. The implication of caste on sanitation is very

obvious in the case of the continuing practice of manual scavenging despite its legal prohibition for the last several decades. The link is further evident in the case of the inhuman and unsafe conditions in which sanitation workers carry out their work which even lead to their death. Thus, chapter six examines the issue of manual scavenging and chapter seven examines the issues faced by sanitation workers, more specifically sewage workers.

Part III is followed by a concluding part that summarises the key arguments and observations made in the previous chapters. It presents a comprehensive understanding of the concept of the right to sanitation and argues for a broad understanding of the right to sanitation in the Indian context. This chapter specifically highlights the implications of inadequate sanitation for the poor and marginalised sections of the society and therefore the need to cater to their sanitation-related issues and concerns. It also explores the opportunities under the ongoing SBM to ensure that the sanitation interventions that are being implemented contribute to the realisation of the right to sanitation, particularly the right of the poor and the marginalised on a priority basis with due regard to the environmental dimension of the right. Lastly, this chapter discusses the lessons that the legal framework at the international level can learn from the experiences in India to ensure that the right to sanitation framework at the international level reflects the needs and concerns in developing countries.

VII. CONVENTIONS USED IN THIS THESIS

- All internet references in this thesis are accurate as of August 2017. Therefore, the date on which they were accessed has not been mentioned in the relevant foot notes.
- Case law referred in this thesis have been cited from established case law reporters in India such as All India Reporter (AIR) and Supreme Court Cases (SCC). However, this thesis has also cited cases collected from web-based case law databases such as Manupatra, the judgment information system managed by the Union Government (judis.nic.in) and Indiankanoon.org. In such cases, details of the cases such as the petition

number, the date of the judgment and the name of the court or tribunal have been provided.

- Hindi words that are used in the thesis have been italicised and their translation in English have been provided separately.

PART-I

THE RIGHT TO SANITATION: CONCEPT, CONTENTS AND REALISATION OF THE RIGHT

SANITATION AS A DISTINCT RIGHT: EVOLUTION, RATIONALE AND SCOPE

Sanitation issues have received increasing attention from law- and policy-makers at the national level in India as well as at the international level. The impact of sanitation issues on human dignity and the realisation of several human rights have led to the articulation of sanitation as a distinct right. Nevertheless, the concept of right to sanitation is still evolving. In India, different people and agencies have understood the concept differently in different contexts. This situation requires an articulation of the right to sanitation that is appropriate to address different sanitation issues in India. An articulation of the right to sanitation in the Indian context may also be relevant to other developing countries where sanitation issues are comparable to that of India.

This chapter examines the nature and scope of the right to sanitation as relevant in the Indian context. The first section examines the legal recognition of the right to sanitation in India and at the international level. The second section examines the bases of articulating a distinct right to sanitation. The third section draws the conceptual framework of the right to sanitation that is suitable to address sanitation issues in India. This is followed by the fourth section that summarises the key aspects of the right to sanitation in India.

I. RIGHT TO SANITATION IN INDIA AND INTERNATIONAL LAW

As discussed in the previous chapter, the trajectory of the evolution of the concept of sanitation and the right to sanitation shows that their scope has been expanded from its historical context of a narrow focus on prevention and control of epidemics to a distinct right to sanitation particularly a right to sanitation that is distinct from the right to water. In this context, this section analyses the

emergence of sanitation as a distinct right in India and at the international level. It also examines the interface between the legal framework¹ in India and the legal framework at the international level.

A. EMERGENCE OF A DISTINCT RIGHT IN INDIA

In India, the emergence of sanitation as a central policy goal has been in tandem with the articulation of sanitation as a distinct right. The right to sanitation is not an explicit fundamental right under the Constitution of India. This is understandable as sanitation was probably not a major concern when the Constitution of India was adopted. However, the Supreme Court of India and various high courts have expanded the scope of the fundamental right to life under article 21 of the Constitution of India over time to include the right to sanitation.

In the early 1980s, the Supreme Court of India in a case concerning the right of prison inmates to meet her lawyer and family members, interpreted the fundamental right to life to include ‘the right to live with human dignity’ and ‘bare necessities of life’.² Although the above-mentioned decision of the Supreme Court of India was not in a case on sanitation issues, it has immense relevance for the right to sanitation as it led the higher judiciary to follow this expansive interpretation of the right to life subsequently to include a number of rights including the right to sanitation within the ambit of article 21 of the Constitution of India.

An explicit recognition of the right to sanitation occurred almost at the same time when the Supreme Court of India met with a sanitation-related case. The issue of the duty of the government (local bodies in this case) to provide basic sanitation facilities such as drains and maintain cleanliness was raised before the Court in the *Ratlam* case.³ The duty of the government to provide basic sanitation facilities

¹ The term ‘legal framework’ used in this thesis denotes the broader framework that consists of constitutional provisions, statutes, policies and institutions.

² *Francis Coralie Mullin v The Administrator* (1981) 1 SCC 608, 618–19 (Supreme Court of India).

³ *Municipal Council, Ratlam v Shri Vardhichand* (1980) 4 SCC 162 (Supreme Court of India).

to meet the needs of the people was explicitly underlined in this case.⁴ This can be considered as an indirect recognition of the right to sanitation through the language of duties. However, the Court arrived at this conclusion primarily on the basis of a law related to the concerned urban local body and not on the basis of the right to life under the Constitution of India.

A more direct recognition of the right to sanitation as part of the right to life in the Constitution of India occurred in *LK Koolwal*⁵—a case where the facts are similar to the *Ratlam* case discussed above. While accepting the public interest litigation, the High Court of Rajasthan held that:

Maintenance of health, preservation of sanitation and environment falls within the purview of Article 21 of the Constitution as it adversely affects the life of the citizen and it amounts to slow poisoning and reducing the life of the citizen because of the hazards created, if not checked.⁶

This legal position was further reiterated by the Supreme Court of India in *Virendra Gaur*.⁷ Having met with the issue of allocation of a piece of land which was originally allotted for sanitation, environmental and recreational purposes to a private party, the Supreme Court of India held that:

Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit...sanitation without which life cannot be enjoyed.⁸

The higher judiciary has also used the expansive interpretation of the fundamental right to life to force local bodies to fulfil their duties related to sanitation. In *BL Wadehra*,⁹ the Supreme Court of India asserted the obligation of the government (in this case the local bodies—the Municipal Corporation of Delhi and the New Delhi Municipal Council) related to sanitation. By underscoring the legal obligations of the Municipal Corporation of Delhi and the New Delhi Municipal

⁴ *ibid* 171.

⁵ *LK Koolwal v State of Haryana* AIR 1988 Raj 2 (High Court of Rajasthan)

⁶ *ibid* 4.

⁷ *Virender Gaur v State of Haryana* (1995) 2 SCC 577 (Supreme Court of India)

⁸ *ibid* 580–81.

⁹ *BL Wadehra v Union of India* (1996) 2 SCC 594 (Supreme Court of India).

Council, the Court held that ‘apart from the rights guaranteed under the Constitution the residents of Delhi have a statutory right to live in a clean city’.¹⁰

The higher judiciary has also used the right to sanitation in cases involving specific contexts, albeit without explicitly using the term ‘right to sanitation’. In a public interest litigation on the right to education, the Supreme Court of India directed all state governments to provide adequate and separate toilet facilities at schools and highlighted the close link between the availability of adequate toilet facilities in schools and the realisation of the right to education, particularly of girl students.¹¹ In a case on the issue of non-availability of toilets for prison inmates inside the cells, the High Court of Madras, by relying on the expansive interpretation of the fundamental right to life, directed the government to install urgently in each cell water closets with water connection.¹² In another case concerning access to toilets at a railway station in Mumbai, the High Court of Bombay directed the Indian Railways to provide toilets and urinals at railway stations and also directed the railway authorities to ensure that toilets and urinal facilities are clean.¹³

The right to sanitation has also been articulated in terms of the duty of the State. Thus, the right to sanitation has been read as a part of the duty of the State to improve public health under the Constitution of India.¹⁴ Sanitation could be further read as part of the duty of the State to ‘protect and improve the environment’ under the Constitution of India.¹⁵ The duty of the State to improve

¹⁰ *ibid* 606–07.

¹¹ *Environmental and Consumer Protection Foundation v Delhi Administration* 2011 (7) SCC 57 (Supreme Court of India).

¹² *P Bharathi v Union Territory of Pondicherry* Writ Petition No 9220 of 2005, Judgment of 6 November 2006, MANU/TN/6013/2006 (High Court of Madras).

¹³ *Ramanathsekhar v Pandho Padhaya General Manager* Writ Petition No 1007 of 1985, Judgment of 7 March 1986, MANU/MH/0370/1986 (High Court of Bombay).

¹⁴ Art 47 of the Constitution of India provides that improvement of public health is a primary duty of the State. It is to be noted that Part IV of the Constitution of India titled “Directive Principles of State Policy” of which this article is a part is not enforceable through courts. These principles are regarded as ‘fundamental in the governance of the country’ and are meant to be applied by the State in making laws (art 37).

¹⁵ *ibid* art 48A.

public health and environment has been held by the Supreme Court of India as a ‘constitutional imperative on the State Government and the municipalities’.¹⁶

The courts have also used it in specific contexts such as removal of filth from public places, provisioning of separate toilet facility in schools for boys and girls and provisioning of toilet facilities at railway stations and prisons. This gives immense opportunity to articulate the right to sanitation in a broad manner in the light of its peculiar features as well as its link with other rights as discussed in the next section. This thesis follows a broad understanding of the right to sanitation as it is revealed from a collective reading of all the cases mentioned above and with the understanding that a constitutional right is dynamic to the extent that it should be interpreted liberally to incorporate and address emerging issues.

The right to sanitation is a derivative right in India, that is a right deriving from the fundamental right to life. This is not surprising as the Supreme Court of India has interpreted the right to life under the Constitution of India to include so many other rights such as the right to livelihood¹⁷ and the right to environment¹⁸. Derivative rights have both advantages and disadvantages when compared to a self-standing right. A major advantage is the possibility of further articulation in the light of emerging contexts which may not be possible beyond a limit in the case of a self-standing right. This is particularly relevant in the case of the right to sanitation because it is comparatively a new right and the complexities of sanitation issues are yet to be fully understood. At the same time, it has the disadvantage of being dependant completely on the imagination and articulation of future petitioners and judges. Nevertheless, it may not be practically feasible to enlist all possible rights in a Constitution although such a route was followed when the right to education was added through an amendment.¹⁹ In this context, an appropriate step would be to elaborate and concretise the contours of the right through a statute.

¹⁶ *Virender Gaur* (n 7) 581.

¹⁷ *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545 (Supreme Court of India)

¹⁸ *Subhash Kumar v State of Bihar* (1991) 1 SCC 598 (Supreme Court of India)

¹⁹ Article 21-A (right to education) was inserted through the Constitution (Eighty-sixth Amendment) Act, 2002.

B. INTERNATIONAL LAW, POLICY AND INSTITUTIONS VIS-À-VIS INDIA

Sanitation has emerged as an important concern in India and at the international level. In this context, it is important to understand the interface between the developments at the international level and in India. At the outset, it needs to be stated that the emergence of the right to sanitation at the international level is a recent development and the concept as it has evolved is comparatively narrower when compared to the development in India. Therefore, there is a scope for international law to learn from the developments in India so that the developments at the international level reflect the needs and concerns of developing countries. This is even more important in a context when international institutions are actively involved in the making and implementation of policy framework for sanitation in developing countries including India. Further, sanitation issues have received significant policy attention at the international level. For instance, sanitation was an important part of the erstwhile Millennium Development Goals (MDGs) and it has found a more visible place in the Sustainable Development Goals (SDGs) adopted in 2015.²⁰ The formulation and implementation of sanitation policies and interventions at the international level and at the domestic level are likely to be significantly influenced by the SDGs. In this context, this section analyses the international law, policy and institutional context of the right to sanitation and its interface with, or implications for, India.

1) International law and the narrow scope of the right to sanitation

A number of legal instruments at the international level directly and indirectly recognise the right to sanitation. Certain treaties have recognised the right to sanitation directly. For instance, the Convention on Elimination of Discrimination against Women calls for countries to ensure the right of women ‘to enjoy adequate living conditions, particularly in relation to...sanitation’.²¹ Similarly, the

²⁰ UN General Assembly Resolution—Transforming Our World: the 2030 Agenda for Sustainable Development, UN Doc No A/RES/70/1, 25 September 2015.

²¹ Convention on the Elimination of All Forms of Discrimination against Women, UN Doc A/RES/34/180 (18 December 1979) art 14.

Third Geneva Convention recognises the right to sanitation of prisoners of war.²² These treaties do not recognise the right to sanitation in a general context; instead they recognise the right for a specific group of people such as women and prisoners of war.

The International Covenant on Economic Social and Cultural Rights 1966 (ICESCR) is perhaps the most important legal instrument in the context of the right to sanitation, but it is silent on the right to sanitation. The ICESCR does not explicitly recognise the right to sanitation. This could be attributed to many reasons including the fact that sanitation was a taboo and it was not recognised as an issue to be addressed through international human rights instruments.²³ However, the indeterminate nature of many explicit provisions in the ICESCR could be a vital opening to expand the scope of the treaty to include emerging issues including sanitation. Most importantly, article 11 which guarantees the ‘right to adequate standard of living’ was intended to be broad and the three specific rights (food, clothing and housing) mentioned therein are only illustrative.²⁴

The subsequent entrenchment of the right to sanitation occurred mainly through soft law instruments adopted under the auspices of the United Nations. For instance, the General Comment No 15 on the right to water adopted by the Committee on Economic, Social and Cultural Rights (CESCR) recognises personal sanitation as an essential component of the right to water.²⁵ It also recognises the duty to ensure access to basic sanitation a core obligation of the

²² Geneva Convention Relative to the Treatment of Prisoners of War, Final Record of the Diplomatic Conference of Geneva of 1949, Vol I, 243 (12 August 1949) art 29.

²³ S Murthy, ‘The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy over Privatization’ (2013) 31 Berkeley Journal of International Law 89, 92.

²⁴ M Craven, *The International Covenant of Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995) 291–93.

²⁵ Committee on Economic, Social and Cultural Rights, General Comment No 15—the Right to Water, UN Doc E/C.12/2002/11, Twenty-Ninth session, Geneva (11–29 November 2002).

State.²⁶ Although the CESCR discussed whether sanitation was to be addressed in further detail, it was apparently not prepared for it.²⁷

A more explicit recognition of the right to sanitation has occurred through United Nations General Assembly resolutions. In 2010, the UN General Assembly adopted a resolution that recognises the right to sanitation ‘as an integral component of the realization of all human rights’.²⁸ The Resolution was adopted with 122 countries voting in favour and none against. This indicates the significant level of support to the idea of human right to water and sanitation at the international level. Even though 41 countries abstained from voting, the major reason for abstention was the lack of transparency and inclusiveness in the negotiation of the Resolution, rather than the specific recognition of the human right to water and sanitation under the Resolution.²⁹

Until recently, the right to sanitation was recognised along with the right to water or in some specific contexts such as the rights of women and prisoners of war. The treatment of sanitation as a right in tandem with the right to water could be seen in legal instruments also. Law instruments at the international level have predominantly used a singular, not a plural noun.³⁰ It has been argued that this indicates an international political consensus on a singular human right to water and sanitation.³¹

The process to separate the right to sanitation from the shade of the right to water began recently. A landmark in this regard is the initiative by the UN Special

²⁶ *ibid* para 29.

²⁷ I Winkler, ‘The Human Right to Sanitation’ (2016) 37(4) *University of Pennsylvania Journal of International Law* 1331, 1355.

²⁸ UN General Assembly Resolution—the Human Right to Water and Sanitation, UN Doc A/64/L.63/Rev.1 (26 July 2010). Winkler notes that ‘the resolution did not proclaim a “new” human right, for which a legal basis in international law might be doubtful, but formally recognized its existence under international human rights law’, see Winkler (n 27) 1371.

²⁹ General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions, Un Doc GA/10967 (28 July 2010).

³⁰ M Langford et al, ‘Revisiting Dignity: The Human Right to Sanitation’ in M Langford and A Russell eds, *The Right to Water: Theory, Practice and Prospects* (Cambridge University Press 2011) 115.

³¹ BM Meier et al, ‘Translating the Human Right to Water and Sanitation into Public Policy Reform’ (Springer 2013).

Rapporteur on the human right to safe drinking water and sanitation. The UN Special Rapporteur argued that sanitation is a distinct right on account of the specific dignity dimension and that, therefore, it ought to be treated as a distinct human right.³² The articulation of a distinct right to sanitation has received wider consensus and momentum subsequently through a number of legal instruments adopted by different organs and agencies of the United Nations.

In 2010, the CESCR adopted the Statement on the Right to Sanitation, which recognises that sanitation is an integral component of the right to an adequate standard of living.³³ Further, the Statement on the Right to Sanitation emphasises the link between sanitation and the right to the highest attainable standard of physical and mental health as well as the right to life and human dignity.³⁴ In 2015, the UN General Assembly adopted a resolution that specifically recognises the human rights to safe drinking water and sanitation.³⁵ This Resolution is significantly different from the previous resolutions as it uses the term ‘human rights’ that recognises distinct rights to water and sanitation as opposed to treating the rights to water and sanitation together as a single integrated right. The UN General Assembly has recently reasserted the recognition of the human rights to safe drinking water and sanitation.³⁶

The implications of the right to sanitation under international law for India appear to be very little. While the right to sanitation as a distinct right under international law is a recent development, it has a longer history in India. The right to sanitation has been recognised as a fundamental right guaranteed in the Constitution of India at least since the early 1980s.³⁷ Further, the right to sanitation as it has evolved at

³² Report of the UN Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, UN Doc A/HRC/12/24 (2009) para 57. See also Winkler (n 27) 1375.

³³ Committee on Economic, Social and Cultural Rights, Statement on the Right to Sanitation, UN Doc No E/C 12/2010/1 (18 March 2011) para 7.

³⁴ *ibid.*

³⁵ UN General Assembly Resolution—the Human Rights to Safe Drinking Water and Sanitation, UN Doc A/RES/70/169 (17 December 2015).

³⁶ UN General Assembly Resolution—the Human Rights to Safe Drinking Water and Sanitation, UN Doc A/RES/72/178 (19 December 2017).

³⁷ See section I.A of this chapter. The recognition of sanitation as a key responsibility of local self-government institutions has a long history in India. Some laws in this regard are as old as

the international level is minimalist in nature as the scope of the right is limited to the issue of disposal of human excreta and associated hygiene.³⁸ This is significantly different from the concept of sanitation (and thus the right to sanitation) as understood in India. The concept of sanitation in India is much broader than basic sanitation facilities and includes overall environmental quality and eradication of insanitary practices such as manual scavenging. Therefore, the concept as evolved at the international level is narrower and inadequate in the Indian context.

Thus, it appears that there is very little that international law can inform or influence India in the right to sanitation context. At the same time, it is possible that the legal developments in India could influence the international legal framework to widen the scope of the concept of right to sanitation. This is already the case to some extent. For example, some of the international documents on the right to sanitation have cited the decision of the Supreme Court of India on sanitation to support the argument for sanitation as a distinct right.³⁹

2) International organisations and implications for India

While the development of the right to sanitation in international law does not seem to have much influence on the right to sanitation in India, the policy framework and certain institutional organisations do or likely to play significant role in the sanitation sector in India. For instance, sanitation (and water) has been a key part of the development agenda at the international level at least since the adoption of the MDGs. This commitment has been further reasserted more visibly and strongly in SDGs. Sanitation was part of a broader goal on environmental sustainability (Goal 7) under MDGs which sought to ‘halve, by 2015, the proportion of the population without sustainable access to safe drinking water and

Tamil Nadu District Municipalities Act 1920 which provides that the municipal council shall provide and maintain public drains, public latrines and urinals Tamil Nadu District Municipalities Act 1920, ss 137 and 145.

³⁸ eg UN General Assembly Resolution—the Human Rights to Safe Drinking Water and Sanitation, UN Doc A/RES/72/178 (19 December 2017).

³⁹ eg Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, UN Doc A/HRC/12/24 (1 July 2009) para 55.

basic sanitation’. Whereas, in SDGs, sanitation is an distinct goal along with water (Goal 6) which seeks to ‘by 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations’. This is indeed likely to channelise more policy attention and funding to address sanitation issues particularly in the developing world. For instance, USAID and the Bill and Milinda Gates Foundation work very close with the Government of India. They provide technical and financial assistance to India’s sanitation programme—Swachh Bharat Mission.⁴⁰ Thus, the policy framework at the international level will have significant impact for the realisation of the right to sanitation particularly in the developing world.

The role of international organisations in this regard could be broadly classified into two. First, the choice of sanitation as a focus area of work by international organisations makes sanitation an important issue of concern at the international level and at the national level. International organisations also tend to encourage or influence national frameworks. For instance, the WHO through its resolutions urges member countries to include sanitation in their health strategies as one of the bases for disease prevention. It also promotes policy goals such as community education, enhanced role for women and appropriate sanitation facilities in health care establishments and schools.⁴¹

Second, international organisations are directly involved in the work of improving sanitation scenario at the national level. For instance, the United Nations Children’s Fund, the World Bank and the Water Supply and Sanitation Collaborative Council (WSSCC) have been playing significant roles in the sanitation sector in India for quite some time. The involvement of these organisations is of different nature and scope. One way is their direct involvement

⁴⁰ Press Information Bureau, USAID, Bill & Milinda Gates Foundation to assist in Swachh Bharat Mission in urban areas, Press Information Bureau, 13 January 2015; Chris Weller, India plans to install 75 million toilets by 2019, with a little help from Bill Gates (11 May 2017) <www.weforum.org/agenda/2017/05/bill-gates-is-helping-india-win-its-war-on-human-waste-heres-how>.

⁴¹ WHO, World Health Assembly Resolution on Drinking Water, Sanitation and Health, Doc No WHA64.24 (24 May 2011).

in sanitation projects. This includes involvement by providing funding or by directly partnering with the government or non-governmental organisations. For instance, the World Bank is actively supporting the ongoing SBM.⁴² Another prominent way is by training implementing agencies at the local level and by publishing, for instance, policy papers and reports. For instance, the World Bank's WSP and the WSSCC have provided training to state level implementing agencies in the state of Rajasthan.⁴³ Thus, the nature of some of the implementation strategies and normative developments in the sanitation sector in India may be attributed partly or fully to the influence of some of the key international organisations. This issue is further discussed in the specific context of gender in Chapter 5.

II. BASES FOR ARTICULATING A DISTINCT RIGHT TO SANITATION

There are mainly three justifications for articulating sanitation as a distinct right. First, various sanitation issues in India have implications for human dignity. For instance, open defecation, lack of facilities for MHM and manual scavenging compromise or violate human dignity. Second, sanitation plays an instrumental role in the realisation of other recognised human rights such as the rights to water, health, education and environment. Third, sanitation issues may disproportionately affect the rights, including the right to sanitation, of the poor and the marginalised. Thus, a distinct right to sanitation may particularly help the poor and the vulnerable to negotiate their rights with the State and private parties.

⁴² World Bank Project—Swachh Bharat Mission Support Operation, Project ID P153251 (2015-2021) <<http://projects.worldbank.org/P153251?lang=en>>.

⁴³ Water and Sanitation Programme, *Compendium of Best Practices in Rural Sanitation in India* (Water and Sanitation Programme 2013) 13, 14.

A. HUMAN DIGNITY: SUPPORTING THE EMERGENCE OF THE RIGHT

Human dignity is perhaps the most important basis of the right to sanitation. The concept of human dignity is based on the intrinsic worth of individuals.⁴⁴ Dignity also needs to be understood in relation to material circumstances in which individuals live. Satisfaction of the essential needs of individuals is an important element of human dignity.⁴⁵ Human dignity is, indisputably, at the core of human rights including the right to sanitation.⁴⁶ The CESCR in its Statement on the Right to Sanitation too has emphasised that sanitation is ‘fundamental for human survival and for leading a life in dignity’.⁴⁷

Sanitation is closely linked to human dignity. Access to a safe and clean place to relieve is indeed a matter of human dignity. Dignity is arguably compromised or violated when someone has to defecate in open or defecate under the fear of being attacked by human beings or animals. Dignity is also violated, for example when sanitation workers are forced to clean sewage without adequate protection or when dalits are forced to clean dry latrines in most cases with a metal plate and a broom.⁴⁸ The Supreme Court of India recognised the link between sanitation and human dignity, and pointed out that:

...failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature’s pressure, bashfulness becomes a luxury and *dignity a difficult art*’ (emphasis added).⁴⁹

The concept of human dignity and its emphasis on the intrinsic worth of every person provide an opportunity to formulate new rights or to expand the existing

⁴⁴ O Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77(4) American Journal of International Law 848.

⁴⁵ *ibid* 851; S Liebenberg, ‘The Value of Human Dignity in Interpreting Socio-economic Rights’ (2005) 21 South African Journal on Human Rights 1.

⁴⁶ For example, the Universal Declaration on Human Rights (UDHR) begins with the recognition that ‘inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. See Universal Declaration on Human Rights, Preamble, UN General Assembly A/RES/217(III) A (10 December 1948).

⁴⁷ Statement on the Right to Sanitation (n 33) para 7.

⁴⁸ The issues of manual scavenging and rights of sanitation workers are discussed in Part III.

⁴⁹ *Municipal Council, Ratlam v Shri Vardhichand* (1980) 4 SCC 162, 171 (Supreme Court of India).

rights to apply to new situations.⁵⁰ Hence, the concept of human dignity forms a strong basis for articulating sanitation as a distinct right.

B. SANITATION AND REALISATION OF OTHER HUMAN RIGHTS: INSTRUMENTALIST ARGUMENTS

The link between sanitation and other human rights such as the rights to health, water, environment and education forms a key basis of, or a rationale for, articulating the right to sanitation.⁵¹ Sanitation is central to the realisation of these human rights.⁵² Legal framework in India and at the international level have explicitly recognised this link.⁵³ In the Indian context, the link is strongly manifested institutionally. For instance, the link with water is obvious in the case of rural sanitation as it comes under the mandate of the Ministry of Drinking Water and Sanitation. Similarly, the Ministry of Health and Family Welfare too implement or deal with certain aspects of the right to sanitation such as MHM. The importance of sanitation for the realisation of other human rights has also led to an argument in favour of constitutionalisation of the right to sanitation.⁵⁴

1) Right to water

The linkages between sanitation and water are indisputable, mutual and contributory in nature. Several important aspects of sanitation such as individual hygiene practices and sewage treatment require water. Hence, adequacy of water is a necessary prerequisite for sanitation. The link between sanitation and water is not unidirectional. Adequate sanitation is a precondition to maintain water quality.

⁵⁰ Schachter (n 44) 853; M Freeman, 'The Philosophical Foundations of Human Rights' (1994) 16(3) Human Rights Quarterly 491, 502. Shelton notes that 'There are legitimate fears that the addition of numerous claims will devalue existing human rights. On the other hand, necessity may lead articulated claims to evolve into recognized rights where satisfaction of needs basic to human dignity is threatened beyond the ability of individual self-help', see D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991–92) 28 Stanford Journal of International Law 103,121.

⁵¹ UN General Assembly Resolution—the Human Rights to Safe Drinking Water and Sanitation, A/RES/70/169 (17 December 2015).

⁵² C de Albuquerque with V Roaf, *On the Right Track: Good Practices in Realising the Rights to Water and Sanitation* (Lisbon 2012) 27; M Langford et al (n 30).

⁵³ Statement on the Right to Sanitation (n 33).

⁵⁴ SD Kamga, 'The Right to Basic Sanitation: A Human Right in Need of Constitutional Guarantee in Africa' (2013) 29 South African Journal on Human Rights 615, 623.

Improper or inadequate mechanism for disposing human excreta may lead to contamination of drinking water sources. For example, improperly constructed toilets may contaminate groundwater.⁵⁵ According to a recent document by the Union Government, untreated faecal sludge and septage from cities together constitute the single biggest source of water pollution in India.⁵⁶ This is particularly a serious issue in India where an overwhelming majority of the population depends on groundwater for drinking purpose.⁵⁷ The link between water and sanitation is further clear from the fact that the sanitation system in the country is predominantly water based. For example, sewerage systems and the prevalent toilet models are water-based. Thus, the inadequacy of water may affect the use of these sanitation facilities. Lack of sufficient water is in fact one of the reasons for the non-use of toilets in India.⁵⁸ Thus, both the right to water and the right to sanitation are inter-dependent.

The mutual link between the rights to sanitation and water has been recognised explicitly at the international level and in India. At the international level, the General Comment No 15 on the right to water strongly underscores the mutual link. Water for personal sanitation as well as water for personal and household hygiene are part of the human right to water.⁵⁹ The link between these two rights have been further highlighted by noting that adequate sanitation is one of the principal mechanisms for protecting the quality of drinking water supplies and resources. Thus, it is an obligation of States to ‘progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children’ arises from the human right to water.⁶⁰ In the Indian context, the link is important from the point of view of the

⁵⁵ PU Megha et al, ‘Sanitation Mapping of Groundwater Contamination in a Rural Village of India’ (2015) 6 *Journal of Environmental Protection* 34.

⁵⁶ Ministry of Urban Development, Draft National Urban Faecal Sludge and Septage Management (FSSM) Policy (28 February 2017).

⁵⁷ Central Ground Water Board, Dynamic Ground Water Resources in India (Central Ground Water Board 2014) 27.

⁵⁸ Government of India, India Country Paper (SACOSAN-VI, Dhaka 11-13 January 2016) 6-7; SA Rashid, ‘Maharashtra Water Crisis Drags ‘Open Defecation Free’ Villages Back to Fields’ *The Indian Express* (Pune 22 May 2016) 1.

⁵⁹ General Comment No 15 (n 25) para 12 (a).

⁶⁰ *ibid* para 29.

Constitution of India because the right to water has also been recognised as a part of the fundamental right to life under the Constitution of India.⁶¹ Although the higher judiciary has not elaborated the contents of the right to water, at least one recent legislative proposal by the Union Government has explicitly included sanitation as an element of the right to water.⁶² Thus, the right to sanitation is relevant for its own sake as well as for the realisation of the right to water.

2) Right to health

Health is an often-cited rationale for sanitation interventions. From a rights perspective, both the rights to sanitation and health are fundamental rights⁶³ and sanitation interventions contribute significantly to the realisation of both the rights. The link between these two rights is multifaceted and realisation of the right to sanitation will have positive implications for the realisation of the right to health. The link between these two rights has different dimensions.

First, the non-realisation of the right to sanitation due to the absence of toilet facilities or proper facilities for disposal of solid and liquid wastes poses risks to public health. According to a document by the Union Government, one in every ten deaths in India is linked to poor sanitation and hygiene, and around 90 per cent of them are children below five years old.⁶⁴ The link between lack of sanitation and diseases is also clear from the fact that open defecation and consequent faecally-transmitted infections are one of the basic causes of undernutrition and stunting.⁶⁵ Thus, sanitation and hygiene have been highlighted

⁶¹ The Constitution of India does not specifically recognise a right to water. However, the higher judiciary has read the right to water as part of the right to life under art 21 of the Constitution of India. See *Subhash Kumar v State of Bihar* (1991) 1 SCC 598 (Supreme Court of India). For a discussion on the fundamental right to water, see P Cullet, 'Realisation of the Fundamental Right to Water in Rural Areas—Implications of the Evolving Policy Framework for Drinking Water' (2011) 46(12) Economic and Political Weekly 56.

⁶² National Water Framework Bill (Draft of May 2016), clauses 2(1)(aa) and 3(1) <http://wrmin.nic.in/writereaddata/Water_Framework_May_2016.pdf>.

⁶³ On the right to health, see *Consumer Education and Research Society v Union of India* (1995) 3 SCC 42 (Supreme Court of India) and on the right to sanitation, see *Virender Gaur* (n 7).

⁶⁴ Ministry of Rural Development, Rural Sanitation and Hygiene Strategy 2012–22 (Ministry of Rural Development 2011) 9.

⁶⁵ R Chambers and GV Medeazza, 'Sanitation and Stunting in India Undernutrition's Blind Spot' (2013) 48(25) Economic and Political Weekly 15.

as important interventions along with initiatives to make available adequate food to address undernutrition and stunting among children in India.⁶⁶ It also reveals the complicated link between sanitation and various other human rights and policy goals. Indeed it seems very difficult to ascertain the causal linkages because certain implications could be a result of cumulative impact of a number of factors and circumstances.

Second, the link between sanitation and health has another important dimension in the Indian context. Occupational diseases of sanitation workers expose the direct link between sanitation and the right to health. Sanitation workers are one of the most neglected and under-protected classes of labourers in India. They work under hazardous conditions without adequate protection which lead to a number of occupation-related diseases and sometimes even the death of workers.⁶⁷

Third, the absence of sanitation facilities disproportionately affects women's health. For instance, women tend to reduce their intake of food and water to avoid the need to go to the field during the day to relieve and this may cause health problems such as urinary tract infections, chronic constipation and other gastric disorders.⁶⁸ The lack of adequate facilities for MHM has also been highlighted as an issue that could impact the health of women.⁶⁹ Thus, the lack of adequate focus on one of the most important sanitation concerns of women makes them unable to realise their rights to sanitation and health.

3) Right to education

Non-availability of sanitation facilities may impact the enjoyment of the right to education. Absence of sanitation facilities may expose children to diseases and it

⁶⁶ *ibid* 17.

⁶⁷ See *Praveen Rashtrapal, IRS and Others v Chief Officer, Kadi Municipality* (2006) 3 GLR 1809, para 4 (High Court of Gujarat).

⁶⁸ G Pardeshi, 'Women in Total Sanitation Campaign: A Case Study from Yavatmal District, Maharashtra, India' (2009) 25(2) *Journal of Human Ecology* 79, 80; M Bapat and I Agarwal, 'Our Needs, Our Priorities; Women and Men from the Slums in Mumbai and Pune Talk About their Needs for Water and Sanitation' (2003) 15 *Environment and Urbanization* 71.

⁶⁹ I Winkler and V Roaf, 'Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality' (2014) 21 *Cardozo Journal of Law and Gender* 1, 8.

may reduce their number of attendance at school.⁷⁰ Further, girl students may lose number of school days during menstruating days if toilets are not sex-segregated or if toilets are not available at schools.⁷¹ Basic sanitation facilities have been explicitly recognised as an essential part of the right to education. For instance, the Swachh Bharat Swachh Vidyayalaya Handbook issued by the Union Government has highlighted the positive impact of the availability of sanitation facilities on the attendance of girl students and the increased retention of female teachers.⁷²

The right to education is a fundamental right explicitly guaranteed in article 21-A of the Constitution of India. The Right of Children to Free and Compulsory Education Act 2009, the legislative framework at the national level for implementing this fundamental right, recognises the explicit link between sanitation and the realisation of the right to education by making it compulsory to have separate toilets for boys and girls in every school.⁷³ The Supreme Court of India has reiterated this norm in a case on the right to education, wherein it observed that the absence of toilet facilities in schools may prevent children (particularly girls) from attending schools.⁷⁴ It was further held that the right to free and compulsory education of children would become meaningless if basic facilities such as toilets are absent in schools and this was held as a violation of the right to free and compulsory education of children guaranteed under the Constitution of India.⁷⁵ Drawing upon this link, in the instant case, the Supreme Court of India directed all schools to provide toilet facilities for boys and girls.⁷⁶

⁷⁰ Government of India, Swachh Bharat Swachh Vidyayalaya 2014. According to a report by the United Nations Development Programme (UNDP), 443 million school days are lost each year due to sickness caused by poor water and sanitation conditions. See UNDP, Human Development Report 2006: Beyond Scarcity: Power, Poverty and the Global Water Crisis (UNDP 2006) 6.

⁷¹ WSSCC and FANSA, Leave No One Behind: Voices of Women, Adolescent Girls, Elderly and Disabled People, and Sanitation Workers (WSSCC and FANSA 2016) 17–18.

⁷² Government of India, Swachh Bharat Swachh Vidyayalaya—A National Mission 2014.

⁷³ Right of Children to Free and Compulsory Education Act 2009, Schedule on Norms and Standards.

⁷⁴ *Environment & Consumer Protection Foundation* (n 11) para 4.

⁷⁵ *ibid.*

⁷⁶ *ibid.*

The Union Government has translated the link between the availability of adequate sanitation facilities at schools and the realisation of the right to education into policy suggestions and actions. The Report of the 14th Finance Commission has recommended local bodies to spend the grant ‘only on the basic services’ to be provided as per the statutes governing local bodies which includes sanitation.⁷⁷ In April 2016, the Union Government issued a circular that underlines the primacy to be given to water supply and sanitation particularly at schools while utilising the grant allotted under the 14th Finance Commission.⁷⁸

4) Right to equality

The right to sanitation is closely linked to the right to equality. This is particularly relevant in a context when there are different categories of people with different needs, concerns and requirements to realise their right to sanitation. At a general level the right against non-discrimination is one of the cornerstones of the human rights law as developed through various human rights instruments at the international level⁷⁹ and as recognised in the Constitution of India⁸⁰. The idea of equality does not just mean formal equality; it also means substantive equality which requires the State to address physical and biological differences as well as systemic inequality perpetrated through social practices and cultural norms. For instance, the Constitution of India recognises the need for special provisions for uplifting the poor and the marginalised.⁸¹

In the right to sanitation context, the right to equality requires the State to adopt affirmative actions so that people with different sanitation needs and requirements are also able to realise their right. For instance, people with disability and the elderly people need barrier free sanitation infrastructure for the realisation of their

⁷⁷ Government of India, Report of the Fourteenth Finance Commission (Government of India 2015) 109.

⁷⁸ Joint Order issued by Ministry of Drinking Water and Sanitation, Ministry of Panchayati Raj and Ministry of Human Resource Development, DO No 11/145/2015-CD 1 (April 2016).

⁷⁹ eg International Covenant on Economic Social and Cultural Rights 1966, article 2.

⁸⁰ See the Constitution of India 1950, articles 14 and 15.

⁸¹ ibid article 15(3)-(5).

right to sanitation.⁸² Similarly, the issue of access to basic sanitation facilities for transgender people also reflects the importance of the right to equality in the sanitation context.⁸³ The issue of gender inequality is another relevant issue in a context when sanitation needs and concerns of women are different.⁸⁴ For instance, adequate facilities for MHM such as access to affordable sanitary napkins and facilities to change and dispose napkins are an important facet of a number of basic human rights of women including the rights to equality, health, education and water.⁸⁵ Similarly, women and transgender people face vulnerabilities such as physical attack and sexual violence due to lack of access to basic sanitation facilities.⁸⁶ Thus, law and policy interventions to facilitate the realisation of the right to sanitation must take into consideration these physical, biological and cultural factors from the point of view of both the rights to sanitation and equality.

5) Right to environment

The right to environment is a fundamental right under the Constitution of India. The higher judiciary has interpreted that the fundamental right to life under the Constitution of India includes the right of enjoyment of pollution free water and air for the full enjoyment of life.⁸⁷ Sanitation interventions play crucial role in the realisation of the right to environment. For instance, sanitation issues such as open defecation and inadequate mechanism for the treatment and disposal of wastewater lead to water pollution and thus adversely affects the realisation of the right to

⁸² WSSCC and FANSA (n 71) 21.

⁸³ *ibid* 29.

⁸⁴ Z Burt et al, Towards Gender Equality through Sanitation Access (UN Women Discussion Paper 2016).

⁸⁵ Winkler and Roaf (n 69).

⁸⁶ S Koonan and L Bhullar, 'Access to 'Safe' Sanitation for Women: Questioning a Myopic Approach' in KJ Joy et al eds, *Conflicts Around Domestic Water and Sanitation in India: Cases, Issues and Prospects* (SOPPECOM 2014) 182.

⁸⁷ *Subhash Kumar v State of Bihar* (1991) 1 SCC 598 (Supreme Court of India). For a general discussion on the right to environment, see J Razzaque, 'Right to a Healthy Environment in Human Rights Law' in M Baderin and M Ssenyonjo (eds) *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 115 and D Shelton, 'Developing Substantive Human Rights' (2010) 1(1) *Journal of Human Rights and the Environment* 89.

environment. Put it differently, sanitation interventions play important role in protecting the environment.⁸⁸

Sanitation dimensions of the right to environment are further clear from the fact that some of the environment-related litigations in India were on issues related to sanitation such as water pollution due to disposal of untreated wastewater, groundwater contamination due to open defecation and issues relating to management of municipal solid waste.⁸⁹ Thus, the realisation of the right to environment is contingent upon the realisation of the right to sanitation among other rights. Some of the significant interventions for the realisation of the right to environment are expected to come from the sanitation sector. In fact, sanitation interventions have the potential to facilitate the co-realisation of the rights to sanitation and environment.

C. EQUITY AND JUSTICE ARGUMENTS

Sanitation issues in India are a site of inequity and injustice particularly for the poor and the marginalised group of people such as women (discussed in Chapter 5) and dalits (discussed in Chapter 7 and 8). This is mainly because on the one hand concerns of certain classes of citizens such as women are inadequately recognised and on the other hand certain classes of citizens such as dalits are exploited by the sanitation sector. One of the advantages of articulating a right is to facilitate the realisation of the right for the poor and the marginalised as they are often incapable of fully realising their rights due to social, economic and cultural factors. Thus, there are a number of advantages in articulating a distinct right to sanitation particularly for the poor and the marginalised as it may help

⁸⁸ For a general discussion on the role of human rights in protecting the environment, see JH Knox, 'Human Rights, Environmental Protection, and the Sustainable Development Goals' (2015) 24 Washington International Law Journal Association 517, 520.

⁸⁹ eg *Almitra Patel v Union of India* Original Application No 199 of 2014, Judgment of 22 December 2016 (NGT—Principal Bench); *Subhash C Pandey v Municipal Corporation Bhopal and Others* Original Application No 34 of 2013, Judgment of 19 September 2014 (NGT—Central Zone Bench); *M Kumaravel v Collector, Kancheepuram District* Application No 273 of 2013, Judgment of 10 October 2015 (NGT—Southern Zone Bench).

them to fight for their rights and fight against injustice perpetrated against them by the State and individuals.⁹⁰

First, an explicit legal recognition of the right to sanitation will elevate sanitation to the level of a legal entitlement as opposed to being a charity or a moral priority. Second, a legal entitlement enhances opportunities for holding the government and other actors accountable for sanitation interventions. Third, the concerns and interests of the vulnerable and the marginalised groups will get attention on a priority basis and it will prevent the focus of the law and policy framework being diverted to the needs and concerns of the dominant and influential groups. This is particularly relevant in a context when, as revealed during the fieldwork in Kerala, vulnerable groups such as migrant labourers and tribals are the worst affected classes due to the lack of sanitation. Fourth, articulating sanitation as a right validates an argument for prioritising the right over other concerns, for instance economic concerns. In fact, there are precedents in this regard in India. For instance, in a case concerning pollution due to waste from mining industries the Supreme Court of India justified an order to shut down industries on the ground that the economic loss to the industries is the price to be paid for protecting people from environmental harm.⁹¹

III. NATURE AND SCOPE OF THE RIGHT AND DUTIES

The realisation of the right to sanitation depends upon how the right and the associated duties are defined in law. The contours of the right to sanitation are yet to be defined in accordance with the various issues related to sanitation in India. This section of the chapter weaves together various elements of sanitation in India to project a comprehensive articulation of the right suitable to the Indian context.

⁹⁰ RM Coleman, 'The Human Right of Sanitation for All: A Study of India' (2011) 24 Pacific McGeorge Global Business & Development Law Journal 267; J Kings, *Judging Social Rights* (Cambridge University Press 2012) 22–26.

⁹¹ *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh* (1985) 2 SCC 431 (Supreme Court of India).

This section also emphasises duties of the State emanating from the right to sanitation.

A. MULTIPLE DIMENSIONS OF THE RIGHT IN THE INDIAN CONTEXT

The right to sanitation in India needs to be understood in its various dimensions such as an individual's right to access to sanitation facilities, environmental aspects of sanitation, gender related concerns, caste dimensions and labour related issues. All these elements are separately discussed in chapters three to seven. This section of the chapter, therefore, focuses on building a conceptual framework and the complexities of each element are analysed in the remaining chapters.

1) Management of human excreta and access to toilet

Management of human excreta is an important aspect of the right to sanitation both from a health and environment point of view. Human faeces can transmit around fifty kinds of infections and therefore one of the key objectives of sanitation interventions is to prevent human contact with excreta.⁹² In this context, the practice of open defecation is regarded as a serious threat to public health.⁹³ Toilet is the often suggested and the most commonly accepted solution to this issue. There are mainly two methods to contain or treat human excreta. One is the on-site mechanism where a toilet is connected to a pit or a septic tank to store human excreta. The other is the off-site mechanism where a toilet is connected to a sewerage network to transport and dispose the waste. Ideally the waste is expected to be treated before it is finally disposed to the environment so that the risk to the environment is nil or minimal.

⁹² R George, *The Big Necessity: the Unmentionable World of Human Waste and Why it Matters* (Metropolitan Books 2008) 175; R Carr, 'Excreta-Related Infections and the Role of Sanitation In the Control of Transmission' in L Fewtrell and J Bartram eds, *Water Quality: Guidelines, Standards and Health* (IWA Publishing 2001) 89, 90.

⁹³ D Spears et al, 'Open Defecation and Childhood Stunting in India: An Ecological Analysis of New Data from 112 Districts' (2013) 8(9) Plus One <<http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0073784&type=printable>>; R Chambers, 'Sanitation and Stunting in India: Undernutrition's Blind Spot' (2013) 48(25) Economic and Political Weekly 15.

Access to toilet is also relevant in terms of ensuring privacy and dignity of individuals. Defecation and urination are regarded as private matters and therefore privacy is important for realising the right to sanitation.⁹⁴ In this context, open defecation is generally regarded as an infringement of privacy and dignity of individuals.⁹⁵

Access in the context of toilets means universal access regardless of factors such as caste, class and gender. This is relevant in the right to sanitation context because certain vulnerable and marginalised classes such as people with disability, transgender people, homeless people and slum dwellers face more serious issues to access toilets than many others. The universal nature of the right is both in terms of individuals as well as places. This means toilet facilities are to be made available in public places such as markets, bus stations, schools and railway stations as well as in private places such as households. Further, such facilities are to be designed in such a way to overcome different physical, social, cultural and economic barriers.

The focus on human excreta management is understandable as the risks to health and environment is widely understood. However, the concern over the excreta of animals and birds is progressively evolving at least to the extent of recognising the potential risks to health and the environment as well as the need for further investigation.⁹⁶ This is relevant in the Indian context as well particularly in rural areas where rearing of cattle is a key livelihood activity.

2) Gender aspects

The right to sanitation has specific gender dimensions.⁹⁷ Women and girls have specific sanitation needs, for instance during the period of pregnancy and

⁹⁴ Report of the UN Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, UN Doc A/HRC/12/24 (2009), paras 55, 57.

⁹⁵ *ibid.*

⁹⁶ J Bartram, 'Introduction' in A Dufour et al, *Animal Waste, Water Quality and Human Health* (WHO 2012) 1.

⁹⁷ WSSCC, 'For Her It's the Big Issue – Putting Women at the Centre of Water Supply, Sanitation and Hygiene—Evidence Report' (WSSCC 2006); T Khanna and M Das, 'Why

menstruation. These gender-related concerns have to be addressed for realising the right to sanitation for women and girls. For instance, access to information and facilities for MHM is an important element of the right to sanitation for women and girls.⁹⁸

Cultural and social factors also make gender dimensions of the right to sanitation relevant. The patriarchal nature of the society imposes several sanitation-related restrictions on women, for instance patriarchy forces women and girls to avoid being seen while going for defecation. Similarly, the taboo associated with menstruation makes MHM a cause of fear, stress and embarrassment.⁹⁹ The gender-based power relationship prevalent in India also poses safety related risks to women in the sanitation context such as the risk of gender-based violence including sexual violence while accessing a community toilet or in the context of open defecation.¹⁰⁰

Thus, gender dimensions of the right to sanitation require mainly three levels of interventions. First, the social and cultural factors and their root in the patriarchy need to be exposed and eliminated to uphold the right to gender equality. This will also help to remove or dilute some of the social and cultural barriers to the realisation of the right to sanitation. Second, sanitation interventions need to adopt a gender sensitive approach to address specific sanitation-related needs and concerns of women. Third, participation of women needs to be ensured in the framing and implementation of the framework for sanitation. Participation of women is essential because it is one of the principles of sanitation in human rights terms¹⁰¹ and it may help addressing sanitation needs and concerns of women.

Gender Matters in the Solution towards Safe Sanitation? Reflections from Rural India' (2015) 11(10) Global Public Health 1.

⁹⁸ Winkler and Roaf (n 69).

⁹⁹ Vatsalya, *Women with Wings: Celebrating Womanhood—Menstrual Hygiene Management Path to Better Health, Dignity, Opportunities and Empowerment* (Vatsalya 2014) 5.

¹⁰⁰ M Sommer et al, 'Violence, Gender and Wash: Spurring Action on a Complex, Underdocumented and Sensitive Topic' (2014) 27(1) *Environment and Urbanization* 105.

¹⁰¹ Statement on the Right to Sanitation (n 33).

3) *Environmental safety*

Safety in the context of the right to sanitation includes environmental safety too primarily because there is a close link between insanitation and environmental pollution. For instance, open defecation may lead to pollution of land and water. Discharge of untreated wastewater is already a major cause of river pollution in India.¹⁰² Sanitation interventions are also a concern from an environmental safety point of view. For instance, improperly built toilets and toilets with deep unlined pits may cause pollution of groundwater.¹⁰³ Similarly, landfills that have been set up for managing municipal solid waste may cause pollution of air and groundwater.¹⁰⁴

The realisation of the right to sanitation is meaningless and impossible in an unsafe environment. A pollution free environment is an indicator and an objective of sanitation interventions. Thus, there are two issues to be addressed. First, the environmental dimensions of the right to sanitation require appropriate sanitation interventions to mitigate environmental pollution due to insanitation. Second, sanitation interventions such as toilets must not lead to environmental pollution.

4) *Caste and labour aspects*

Caste plays an important role in the sanitation sector in India and it is an obstacle to realise the right to sanitation. Sanitation work in India is primarily a caste-based work. An overwhelming majority of sanitation workers are dalits.¹⁰⁵ This is the continuation of the historical practice where the caste system allocated all menial jobs including the sanitation work to the people in the lowest strata of the caste system.¹⁰⁶

¹⁰² Central Pollution Control Board (CPCB), Performance Evaluation of Sewage Treatment Plants under NRCD (CPCB 2013) 2–8.

¹⁰³ Megha et al (n 55).

¹⁰⁴ Bhalaswa Lok Shakti Manch and Hazards Centre, Ground Water Quality and Health Impacts in Bhalaswa, New Delhi (Bhalaswa Lok Shakti Manch and Hazards Centre 2012).

¹⁰⁵ Human Rights Watch, 'Cleaning Human Waste: Manual Scavenging, Caste and Discrimination in India' (Human Rights Watch 2014).

¹⁰⁶ S Gatade, 'Silencing Caste, Sanitising Oppression' (2015) 50(44) Economic and Political Weekly 31.

Dry latrines and the associated practice of manual scavenging are important issues in the right to sanitation context. The practice of cleaning human excreta manually is incompatible with the basic tenets of human rights and is a violation of the right to sanitation. It should not be allowed to continue due to the health implications for manual scavengers as well as due to implications for the environment. It amounts to a violation of human dignity. Further, the Constitution of India and various statutes prohibit and criminalise the practice of manual scavenging.¹⁰⁷ Nevertheless, it continues. Therefore, total elimination of dry latrines and the practice of manual scavenging must be an important part of sanitation interventions.

Safety while undertaking sanitation work is an important concern in India. Sanitation workers (predominantly dalits) in Uttar Pradesh during a focus group discussion admitted that they are often asked to enter the sewerage without adequate protection with serious risks for their health and life. In some cases, the practice even led to deaths of workers due to poisonous gases among other reasons.¹⁰⁸ This is diametrically opposite to one of the key objectives of sanitation interventions, which is the prevention of direct contact between human beings and excreta. Further, the manual entry to sewerage without protection by definition is manual scavenging and therefore prohibited under law.¹⁰⁹ While sanitation work may be essential for realising the right to sanitation, it must not violate the same right of sanitation workers among other human rights. In addition to the safety issue, sanitation workers also face issues such as inadequate payment and job insecurity.¹¹⁰ This underlines the need for recognising the importance of sanitation workers for the realisation of the right to sanitation and ensuring the realisation of their rights in relation to safe working environment and social security.

¹⁰⁷ Constitution of India 1950, art 17 (prohibition of untouchability); Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993; Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013.

¹⁰⁸ A Angad, 'Cleaning Lajpat Nagar Sewer, 3 Labourers Die of 'Suffocation'' *The Indian Express* (Delhi 7 August 2017) 5.

¹⁰⁹ Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013, s 2(1)(g).

¹¹⁰ Praxis, *Down the Drain: A Study on Occupational and Health Hazards and the Perils of Contracting Faced by Sewerage Workers in Delhi* (Praxis 2014).

B. DUTIES OF THE STATE IN REALISING THE RIGHT

The right to sanitation having been recognised as part of the fundamental right to life under the Constitution of India, the State is tasked with the primary duty to ensure the realisation of the right for all. While there are little disputes as to the fact that the State is the primary duty-bearer, the nature and scope of the duty are constantly evolving.¹¹¹ At a general level, all socio-economic rights of which the right to sanitation also belongs entail three kinds of duties—duties to respect, protect and fulfil.¹¹² While the duty to respect requires the State to refrain from interfering with the right, the duty to protect requires the State to take actions to prevent third parties from interfering with the rights. The duty to fulfil is probably the most controversial part, as it requires the State to adopt affirmative actions to facilitate the realisation rights. The positive duty in the context of socio-economic rights means a duty to ensure that all individuals are able to exercise their rights. The State is expected to remove constraints that limit people's ability to exercise their rights including by arranging resources.¹¹³

The duty of the State in this regard is not necessarily a duty to make the rights a reality immediately.¹¹⁴ As the realisation of socio-economic rights requires multipronged policy interferences and budget allocation, they are meant to be realised progressively. However, progressive realisation is not meant to be an excuse for delaying the realisation of rights unreasonably. It only indicates the possibility of adopting the strategy of gradual and incremental improvement in the realisation of the right.¹¹⁵ Thus, the idea of progressive realisation does not rule out the possibility of the State having to explain and justify the measures adopted

¹¹¹ The classic debate between positive and negative rights seems irrelevant in today's context as the status of socio-economic rights and positive duties stemming from such rights are settled. See Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna (25 June 1993). See also U Baxi, *Human Rights in a Posthuman World* (Oxford University Press 2007) 39–40.

¹¹² General Comment No 15 (n 25).

¹¹³ S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) 77.

¹¹⁴ For a discussion on obligation of the State in the context of socio-economic rights, see A Alston and G Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156.

¹¹⁵ Albuquerque and Roaf (n 52) 23.

to realise the right.¹¹⁶ The immediate obligation implied in this duty demands avoidance of all retrogressive steps and a duty to guarantee that the principle of non-discrimination is not violated while implementing the rights. This essentially entails special consideration of the issues and concerns of the vulnerable and the marginalised people.¹¹⁷

In the specific context of the right to sanitation, following elements could be extrapolated.¹¹⁸ First, the duty of the State involves a duty to provide. For instance, it is a duty of the State to set up mechanisms for treating wastewater. There are some divergent views on the duty of the State to provide basic sanitation facilities to individuals. An emerging view is that it is primarily the duty of individuals to make arrangements for basic sanitation, for instance to build toilets or to buy sanitary napkins. The duty of the State comes only when an individual is incapable of self-help due to reasons such as poverty.¹¹⁹ This argument does not reflect the reality in India. This approach may be inappropriate in the Indian context where majority of the population is still living in poverty.¹²⁰ In fact, the government has been playing an active role in carrying out sanitation interventions including the provisioning of basic sanitation facilities such as toilets and sanitary napkins. Further, sanitation is a constitutional right and it is universal in nature. Thus, an appropriate approach would be to understand it as a universal right and people who are capable of exercising their right could be exempted from the scope of affirmative actions.

Second, it is a duty of the State to put in place a regulatory framework and adopt appropriate programmes and policies to facilitate the realisation of the right.¹²¹

¹¹⁶ Fredman (n 113).

¹¹⁷ Craven (n 24); AJ Rosga and ML Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) 27 *Berkeley Journal of International Law* 253, 263–64.

¹¹⁸ Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque, UN Doc No A/HRC/12/24 (1 July 2009).

¹¹⁹ *ibid.* See also Winkler (n 27) 1387.

¹²⁰ According to the Socio Economic and Caste Census, 2011 the main earning member of nearly 74.52 per cent of the rural households earn less than rupees 5000 per month (about 77 USD). See Socio Economic and Caste Census, 2011, Summary Report <<http://secc.gov.in/stateSummaryReport>>.

¹²¹ Winkler (n 27) 1391.

This must include the duty to set up a mechanism to guarantee accountability of the responsible government agencies. Third, it is important for the State to set up an institutional mechanism that right-holders could approach for remedies in case of violation of their right. This may be a judicial or an administrative body. Fourth, the State is obliged to respect and give effect to the procedural aspects of human rights. This mainly includes a duty to ensure that the concerned right-holders have access to information and they participate in the decision making as well as implementation process.

Another major challenge in this context is the ways in which duties of a State can be monitored. The rights to information, participation and remedies could work as a check on the duties of the State. The approach of progressive realisation can be monitored. For instance, the standard of sufficiency, efficiency and equity may be used to evaluate the compliance of the State with the standard of ‘maximum available resource’.¹²² Sufficiency denotes how much percentage of the national income has been earmarked. Efficiency indicates how the available or earmarked money are being used. Equity requires the spending to be made in an equitable way among different groups.¹²³ For instance, the question whether the concerns of the most marginalised have been addressed could be raised to evaluate the efficiency and equity criteria.

The ideas of benchmarks and indicators have been mooted to measure the extent to which a right has been realised.¹²⁴ To put it differently, benchmarks and indicators may be used to measure the extent to which a State has complied with its obligations. In the context of the right to sanitation in India, this could mean, but not limited to, all the key elements of the right to sanitation explained in the previous section. At the same time, there is a concern that benchmarks and

¹²² Fredman (n 113) 81–82.

¹²³ *ibid.*

¹²⁴ United Nations High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations High Commissioner for Human Rights 2012). See also G de Beco, ‘Human Rights Indicators for Assessing State Compliance with International Human Rights’ (2008) 77 *Nordic Journal of International Law* 23; M Green, ‘What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement’ (2001) 23(4) *Human Rights Quarterly* 1062.

indicators are likely to reduce the assessment to a technical exercise and may limit the space for political and legal accountability.¹²⁵

IV. ARTICULATING A MULTI-FACETED RIGHT FOR THE INDIAN CONTEXT

Sanitation has been recognised as a fundamental right under the Constitution of India. Although sanitation is not an explicit right under the Constitution of India, the higher judiciary in India has interpreted the fundamental right to life to include sanitation. Thus, the right to sanitation derives from the fundamental right to life. The right to sanitation, understood as a fundamental right, must be the key guiding principle for further conceptualisation and implementation. As a result, the basic principles of human rights such as non-discrimination, accountability, remedies, information and participation are by default applicable to the right to sanitation.

The higher judiciary has not elaborated on the nature and scope of the right while recognising it. Even though the elaboration of the right is expected to happen through statutes and case law, it has not happened so far. Therefore, the articulation of the right needs to be done by extrapolating the existing conceptual understanding of socio-economic rights in general in India and at the international level.

Broadly, there are three justifications for articulating a distinct right to sanitation. First, human dignity is at the core of sanitation. Sanitation issues such as lack of toilets and lack of facilities to maintain MHM are reflections of indignity associated with sanitation. Violation of dignity is further evident in the practice of manual scavenging. Second, articulating a distinct the right to sanitation will have instrumental benefit for realising several other human rights such as the rights to water, health, education, equality and environment. Similarly, sanitation facilities in schools arguably help girl students to realise their right to education. Third, equity and justice based arguments highlight that articulating sanitation as a right

¹²⁵ Rosga and Satterthwaite (n 117) 258.

empower people particularly the poor and the marginalised to force the State to take affirmative actions. Further, it brings the elements of accountability and transparency in the implementation of sanitation interventions. This aspect is particularly relevant in the Indian context because the right to sanitation matters more for the poor and the marginalised such as slum dwellers, sanitation workers and manual scavengers. Overall there is a strong case for articulating a right to sanitation for improving the living conditions of the people and for realising several guaranteed human rights.¹²⁶

The right to sanitation in the Indian context is a multifaceted right and it may be developed broadly around four key elements. First, access to toilet is an important dimension of the right. Access to toilet arguably addresses some of the core aspects of the right such as dignity, privacy and safety. The language of right further opens up the possibility of prioritising the basic sanitation needs of certain classes of people such as people with disability and the homeless people. Second, sanitation in India is highly gendered and therefore gender dimensions are crucial in conceptualising and implementing the right. Third, environmental pollution is a consequence of insanitation (eg discharge of untreated wastewater) as well as unmindful sanitation interventions (eg deep unlined toilet pits). Therefore, safety in the context of the right to sanitation essentially includes the safety of the environment as well. Fourth, sanitation in India is a site of caste-based violence and violation of labour rights with implications for dignity and health of the workers concerned.

The right to sanitation further emphasises the correlative duty of the State to ensure that everybody is able to realise their right. The duty of the State in this regard includes provisioning of sanitation facilities, setting up of a regulatory mechanism and ensuring accountability. It is also a duty of the State to ensure that adequate information is available to right-holders and the duty to ensure effective participation of the right-holders. The active role of the State vis-à-vis sanitation is not a new phenomenon in India. In fact, the Union Government has been

¹²⁶ See also Winkler (n 27) 1366–67.

executing sanitation interventions in the last few decades. However, these efforts were not based on the understanding of its legal duties emanating from the right to sanitation. Thus, the active role of the State must continue but with a radical change in the understanding of the role of the State in the light of the right to sanitation.

The right to sanitation in India needs to be examined in relation to the similar developments at the international level to explore the possibility of mutual learning. The right to sanitation as evolved at the international level is minimalist in nature and is limited to the issue of disposal of human excreta and associated hygiene. This is significantly different from the right to sanitation as understood in India. The concept of sanitation in India is much more than basic sanitation facilities and includes overall environmental quality and eradication of insanitary practices such as manual scavenging. It also includes the rights of sanitation workers. These aspects are either missing in the articulation of the right to sanitation at the international level or they appear as an after-thought.¹²⁷ Therefore, the concept of right to sanitation in India is more comprehensive than it is understood at the international level.

The broad conceptualisation of the right to sanitation in India probably reflects the general scenario and the need in a developing country context. People in developing countries are facing severe sanitation-related issues.¹²⁸ Therefore, the articulation of the right to sanitation in international law needs to be based primarily on the experiences and struggles of the people in developing countries. In this context, the articulation of the right to sanitation in India could have significant implications for further conceptual developments at the international level from a developing country perspective.

¹²⁷ One of the reports of the Special Rapporteur mentions manual scavenging; see Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, UN Doc No A/HRC/27/55 (30 June 2014); The Dhaka Declaration adopted by the sixth South Asian Conference on Sanitation (SACOSAN) has included the concerns of sanitation workers. See Dhaka Declaration 2016 <www.ielrc.org/content/e1606.pdf>.

¹²⁸ See generally WHO et al, Progress on Drinking Water, Sanitation and Hygiene—2017 Update and SDG Baselines (WHO and UNICEF 2017).

SUMMARY

Sanitation is closely linked to human dignity and realisation of several human rights. Sanitation scenario in India, and probably in other developing countries, is inadequate to the extent that realisation of human rights and the enjoyment of human dignity are difficult, particularly for the poor and the marginalised. This scenario necessitates and justifies the articulation of sanitation as a distinct right.

Sanitation has been a focus of policy attention for long albeit with varying degree of focus and underlying objectives from time to time. Sanitation has been recognised as a fundamental right at least since the early 1980s. At the same time, there has not been any concerted effort to explicitly use the term ‘right to sanitation’ and to conceptualise the right such that it takes into consideration all the relevant aspects of the right such as caste, class, gender and environmental aspects. Thus, there is still the absence of a statutory framework that would clarify the concept, guide its implementation and ensure the realisation of the right.

Sanitation issues in India are diverse. It has infrastructure dimension as well as social and cultural dimensions. The multifaceted nature of sanitation issues therefore requires a broad conceptualisation of the right to sanitation that includes all important issues such as lack of infrastructure, lack of information and participation, gender inequality, environmental pollution, the link between sanitation and caste, and violation of labour standards.

REALISING THE RIGHT IN INDIA: STATUTORY AND POLICY FRAMEWORK

In India, there is no single statutory framework governing the implementation of the right to sanitation comprehensively and exclusively. The statutory framework for realising the right to sanitation consists of a number of statutes, each addressing different aspects of the right directly or indirectly. The existing statutory framework is sectoral in nature; it is divided on the basis of different aspects of the right and administrative jurisdictions. For example, separate statutory frameworks exist for urban and rural sanitation. Some statutes are at the Union level and applicable to the whole country whereas some others are state laws and applicable only to the concerned state. Environmental laws and laws relating to manual scavenging further demonstrate the sectoral nature of the statutory framework related to the right to sanitation in India.

The fragmented nature of the statutory framework led to the gaps being filled by the policy framework issued by the executive branch of the Union Government and state governments from time to time. This has also led to a scenario where the Union Government has been using the policy framework as a tool to encourage and push states to implement sanitation initiatives designed by it. Given the fact that a majority of the policies and administrative directions are part of the programmes and schemes that provide fund to the state governments, they have become the key source of operational norms for implementing agencies. Implementing agencies at the local level consider the policy framework as *the* framework for operational purposes. Thus, the framework for realising of the right to sanitation in India is characterised by the co-existence of the statutory framework and the policy framework. At the same time, the policy framework has been primarily governing the sanitation sector.

This chapter maps the statutory and policy framework related to the right to sanitation. The first section describes the existing statutory framework relevant to the realisation of the right to sanitation followed by the second section that describes the policy framework pertaining to the right. The third section examines the relationship between the statutory framework and the policy framework and analyses its implications from a right to sanitation perspective. This is followed by the fourth section that recaptures the key arguments of, and observations in, the chapter.

I. STATUTORY FRAMEWORK

The recognition of the right to sanitation by the higher judiciary as part of the fundamental right to life in the Constitution of India is an important step towards the realisation of the right. At the same time, a framework for implementing the right, preferably a statutory framework, is equally important to make the right a reality. The statutory framework relating to sanitation in India is complex and fragmented. This is partly because the Constitution of India vests the power to enact laws on sanitation on state legislatures.¹ None of the state legislatures have so far enacted a comprehensive law on sanitation. However, there are many statutes at the state-level that directly or indirectly address some of the dimensions of the right to sanitation, for instance, statutes governing local governments in rural and urban areas. In addition to state laws, there are statutes at the Union level that are relevant in the right to sanitation context, for instance statutes addressing environmental aspects of sanitation.

A. STATUTORY INSTITUTIONS AT MULTIPLE LEVELS WITH MULTIPLE FUNCTIONS

A number of statutes relevant in the right to sanitation context are, in fact, institutional laws. They mainly focus on the establishment of an institutional mechanism to carry out various functions including functions related to sanitation. Such laws exist at the state level and at the union level.

¹ Constitution of India 1950, art 246 read with Seventh Schedule, List II, Entry 6.

1) Sanitation duties and functions of local self- governments

Statutes regulating local self-government institutions in rural and urban areas constitute a major part of the statutory framework relating to the right to sanitation² and they have a long history in India dating back to the colonial era.³ The idea of entrusting key powers and functions related to sanitation to local bodies has been given further constitutional endorsement through the adoption of the 73rd and 74th Constitutional amendments in 1992 that envisage the key powers and functions related to sanitation to be vested with the local self-government institutions.⁴

In the rural sanitation context, the laws governing local self-governments in rural areas (Panchayati Raj Institutions—PRIs) contain provisions that make sanitation a responsibility of gram panchayats (GPs).⁵ There are mainly two ways in which the legal responsibility of GPs has been provided in PRI laws. First, GPs are responsible to take all necessary actions for the improvement of sanitation. This includes implementation of rural sanitation schemes and sanitation-related activities such as cleaning of public roads, drains, tanks, wells and other public places, construction and maintenance of public toilets, and maintenance and regulation of burial grounds.⁶

Second, GPs have the power to give direction to individuals to take sanitation measures in the premises they control or own. This includes the power to direct individuals to maintain cleanliness in the premises controlled by them.⁷ In the case of non-compliance with such directions, GPs are empowered to get the necessary work done and recover the cost of performing it from such persons.⁸

² eg Kerala Panchayat Raj Act 1994; Uttar Pradesh Panchayati Raj Act 1947.

³ eg Tamil Nadu District Municipalities Act 1920.

⁴ Constitution of India 1950, arts 243G and 243W.

⁵ Three-tier panchayat system is followed in India in the administration of rural areas. Gram Panchayat is the local self-governing unit at the village level followed by Block Panchayat and District Panchayat in the ascending order.

⁶ eg Kerala Panchayat Raj Act 1994, s 166 and the Third Schedule; Uttar Pradesh Panchayati Raj Act 1947, s 15.

⁷ eg Arunachal Pradesh Panchayati Raj Act 1997, s 33(1).

⁸ eg *ibid* s 24; Kerala Panchayat Raj Act 1994, s 166.

Some state laws prescribe punishment such as fine for non-compliance with the directions issued by the appropriate authorities in this regard.⁹

While GPs are responsible for sanitation under PRI laws, other institutions including panchayats at the block and district levels established under PRI laws also play crucial roles. For example, it is a duty of the Block Panchayat to ‘provide for and make arrangements’ for rural sanitation.¹⁰

Similarly, in the urban sanitation context, urban local bodies (ULBs) are primarily responsible for ensuring adequate sanitation in their concerned jurisdictions. Law governing ULBs generally prescribes powers, duties and functions of municipal authorities. This includes sanitation-related duties such as disposal of wastewater, disposal of night soil, and provisioning of urinals and cesspools.¹¹ In certain big cities, separate laws exist to manage water supply and sanitation. These laws establish distinct utilities or para-statal agencies¹² to provide water supply and sanitation services.¹³ Laws governing para-statal agencies also include explicit provisions relating to sanitation, for example sewage disposal.¹⁴

There are significant differences in the manner in which different laws have articulated the responsibility of local bodies. While some laws have used unconditional language in prescribing the responsibilities¹⁵, others have used a conditional language that makes fulfilment of the responsibilities contingent upon other factors, for instance, availability of money.¹⁶ The legal implication of a

⁹ eg Maharashtra Zilla Parishads and Panchayat Samitis Act 1961, s 191.

¹⁰ eg Arunachal Pradesh Panchayati Raj Act 1997, s 75.

¹¹ eg Rajasthan Municipalities Act 2009 s 45(1).

¹² Para-statals are semi-government organisations, companies or agencies owned or controlled wholly or partly by the government, which have their own governing boards.

¹³ eg Delhi Jal Board Act 1998 (Delhi Jal Board); Calcutta Metropolitan Water and Sanitation Authority Act 1966 (Calcutta Metropolitan Water and Sanitation Authority); Bangalore Water Supply and Sewerage Board Act 1964 (Bangalore Water Supply and Sewerage Board).

¹⁴ eg Bangalore Water Supply and Sewerage Board Act 1964, s 15; Calcutta Metropolitan Water and Sanitation Authority Act 1966, s 8(1).

¹⁵ eg Kerala Panchayat Raj Act 1994, s 166; Bihar Panchayat Raj Act 2006, s 22.

¹⁶ eg Punjab Panchayati Raj Act 1994, s 30; Haryana Panchayati Raj Act 1994, s 21. See also L Bhullar, ‘Ensuring Safe Municipal Wastewater Disposal in Urban India: Is There a Legal Basis?’ (2013) 25(2) Journal of Environmental Law 235, 240.

conditional language is that it makes such legal responsibilities virtually unenforceable if the local bodies rely on the excuse of non-availability of money.

The question whether a local body can rely on non-availability of money as a valid excuse for the non-fulfilment of its statutory duties including sanitation was discussed by the Supreme Court in *Ratlam Municipality*.¹⁷ In the instant case, the court held that the excuse of insufficient money is unjustifiable. The Supreme Court relied on two reasons to reach the decision. First, the Court relied on the concerned provision in the Madhya Pradesh Municipality Act 1961.¹⁸ Second, the Court used the human rights aspects of sanitation and held that:

A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage systems- not pompous and attractive, but in working condition and sufficient to meet the needs of the people cannot be evaded if the municipality is to justify its existence.¹⁹

Ratlam Municipality underscores the legal position that the nature of sanitation-related responsibilities of a local body essentially depends upon the nature of the language used in the statute. It also demonstrates that legal duties, if stated clearly in the statute, can be effectively enforced. For example, the Supreme Court of India directed the local body to ‘construct a sufficient number of public latrines for use by men and women separately, provide water supply and scavenging service morning and evening so as to ensure sanitation’.²⁰ At the same time, the use of the language of human rights by the Court and its essential attributes (dignity and decency) as ‘a first charge on local self-governing bodies’ seemingly makes it a paramount duty of local bodies.²¹ It arguably can be utilised to force local bodies to prioritise the implementation of the right to sanitation along with other fundamental rights.

¹⁷ *Municipal Council, Ratlam v Vardhichand* (1980) 4 SCC 162 (Supreme Court of India).

¹⁸ S 123 of the Madhya Pradesh Municipalities Act 1961 the duty of a municipal council to undertake and made reasonable and adequate provision for sanitation among other things.

¹⁹ *Municipal Council, Ratlam* (n 17) 171.

²⁰ *ibid* 173.

²¹ *ibid* 171.

2) State and union level institutions

In addition to laws governing local self-government units, some state governments have adopted state-level laws to address water supply and sanitation issues exclusively.²² Laws adopted in this regard vary from state to state. Nevertheless, they share a common characteristic, that is, the establishment of a state-level agency (usually known as water supply and sewerage board) to discharge functions related to one of the important aspects of the right to sanitation, that is sewage management. This includes the preparation, execution, promotion and financing of schemes for sewage disposal, establishment of standards for sewerage services and rendering of all necessary services in regard to sewerage to the state government and local bodies.²³ Some laws prescribe duties of individuals as well. For instance, the Goa Sewerage System and Sanitation Services Management Act 2008 makes it mandatory for individuals to avail the facility of the sewerage system and sanitation services to avoid causing nuisance to health or property.²⁴

While the major purpose of these laws is to establish state-level agencies, different state laws follow different approaches. Some states have adopted laws that give complete control and management of water supply and sewerage system to a state-level agency. For instance, the Goa Sewerage System and Sanitation Services Management Act 2008 gives the power to control and manage sanitation services and sewerage system to the Public Works Department.²⁵ There are also state laws, which do not take over the existing system or replace the existing system. Instead, they facilitate, for instance, the preparation of draft plans for water supply, sewerage and drainage and the establishment of a state-level standard for water supply and sewerage services and inspection of all water and sewerage facilities in the state operated by other agencies.²⁶

²² eg Orissa Water Supply and Sewerage Board Act 1991, Uttar Pradesh Water Supply and Sewerage Act 1975, Goa Sewerage System and Sanitation Services Management Act 2008.

²³ eg Uttar Pradesh Water Supply and Sewerage Act 1975, ss 14–15 and 24.

²⁴ Goa Sewerage System and Sanitation Services Management Act 2008, s 4.

²⁵ *ibid* s 3(1).

²⁶ eg Orissa Water Supply and Sewerage Board Act 1991, s 21.

These statutes generally empower the agency constituted under the Act to ‘control and manage’ sanitation services and sewerage system. Rights of individuals and duties of the government are not clearly provided. The aim of the statutory framework appears to be the establishment of a state-level institutions to control sanitation infrastructure rather than providing a framework that defines rights and duties and sets up an institutional mechanism for implementing the right. Nevertheless, they play crucial role in the realisation of the right to sanitation due to their extensive role in creating and maintaining sanitation infrastructure as well as deciding who can or cannot access them.

Even though state legislatures alone are empowered to adopt laws related to sanitation, Union-level institutions also play important role in the realisation of the right to sanitation. For instance, the Central Pollution Control Board (CPCB) established under the Water (Prevention and Control of Pollution) Act 1974 (Water Act) plays an important role, for instance by laying down water quality standards and by carrying out various functions to control water pollution.²⁷ Similarly the Bureau of Indian Standards (BIS) is an important standard setting body at the central level. The BIS has formulated standards relevant in the sanitation context, for instance standards to regulate the on-site management of human excreta.²⁸ However, the role of some of these Union level institutions are either supportive in nature or they do not have the power to issue binding norms and standards.

B. ENVIRONMENTAL LAWS: ADDRESSING THE POLLUTION RELATED ASPECTS OF SANITATION

Environmental laws address certain important dimensions of the right to sanitation, for instance environmental pollution due to human excreta. Existing environmental laws provide the framework to regulate the generation, treatment

²⁷ Water (Prevention and Control of Pollution) Act 1974, s 16.

²⁸ eg Standards for Discharge of Sewage in Surface Waters (IS 2296: 1982); Code of Practice for Installation of Septic Tanks (IS 2470: 1986); Code of Practice for Installation of Septic Tanks (IS 2470:1985;) Code of Practice for Sanitation with Leaching Pits for Rural Communities (IS 12314:1987).

and disposal of wastes and thus it forms a key part of the statutory framework related to the right to sanitation. Two statutes are primarily relevant in this context.

First, the Water Act directly addresses one of the key aspects of sanitation that is water pollution due to insanitation. Many provisions in the Water Act are thus directly linked to the realisation of the right to sanitation.²⁹ For instance, the Water Act regulates the treatment and discharge of wastewater. It requires the state government to constitute a state pollution control board (SPCB) and empowers the SPCB to regulate effluents to be discharged into streams.³⁰ It tasks the SPCB with laying down standards for treatment of sewage and trade effluents to be discharged into streams.³¹ It also prohibits the use of streams or wells for disposing poisonous, noxious or polluting matters.³²

Second, the Environment (Protection) Act 1986 (EP Act) is another key statute relevant in the right to sanitation context. The EP Act prohibits the discharge of environmental pollutant in excess of standards as may be prescribed under the Act.³³ It gives ample powers to the Union Government to prescribe standards for the disposal of effluents and take actions in case of non-compliance with the standards.³⁴ Such actions, for instance, may go to the extent of an order to close a factory.³⁵ The legal regime on waste management in India mainly consists of various rules framed under the EP Act, for instance the Rules for the safe management of plastic waste,³⁶ bio-medical waste,³⁷ electronic waste³⁸ and municipal solid waste.³⁹

In addition to the specific statutes mentioned above, there are certain environmental law principles—sustainable development, precautionary principle

²⁹ See generally the functions of SPCBs under s 17 of the Water Act.

³⁰ Water (Prevention and Control of Pollution) Act 1974, ss 4 and 16.

³¹ *ibid* s 17(k).

³² *ibid* s 24.

³³ Environment (Protection) Act 1986, s 7.

³⁴ *ibid* s 3(2)(iii).

³⁵ *ibid* s 5.

³⁶ Plastic Waste Management Rules 2016.

³⁷ Bio-Medical Waste Management Rules 2016.

³⁸ E-Waste (Management) Rules 2016.

³⁹ Solid Waste Management Rules 2016.

and the polluter pays principle—which are relevant in the context of the right to sanitation. All the three principles mentioned above have been made part of environmental law in India by the higher judiciary.⁴⁰ Further, the National Green Tribunal Act 2010 explicitly recognises these principles.⁴¹ The link between the principle of sustainable development and sanitation is indisputably clear from the fact that sanitation was a part of the MDGs and more visibly a part of the SDGs (Goal 6). As it is clear from the SDGs, the concept of sustainable development encompasses realisation of human rights, protection of environment and various other socio economic goals including poverty alleviation. Since, sanitation is linked to all these goals in multiple ways as discussed in chapter 1, sanitation interventions contribute significantly towards the achievement of the goal of sustainable development.

The precautionary principle is relevant in the context of environmental implications of sanitation. This principle is important in the context of the right to sanitation as it demands precautionary actions from the government even in circumstances where there is inadequate scientific proof. The polluter pays principle is likely to serve the purpose of being a deterrent factor that forces individuals, communities and companies to take adequate diligence to avoid adverse environmental implications due to sanitation interventions or insanitation.

C. PROHIBITION OF DRY LATRINES AND MANUAL SCAVENGING

Use of dry latrines and the related practice of manual scavenging are incompatible with, and contradictory to, the right to sanitation. Manual scavenging is a violation of the right to sanitation of the concerned manual scavengers because the right to sanitation envisages a scenario where human beings are not in direct contact with human excreta and other wastes; and wastes are to be disposed of with no or minimum harm to public health and the environment. It also demonstrates a situation that certain human excreta disposal practices lead to

⁴⁰ See *Vellore Citizens' Welfare Forum v Union of India* Write Petition No 914 of 1991, Judgement of 28 August 1996 (Supreme Court of India).

⁴¹ National Green Tribunal Act 2010, s 20.

violation of several basic tenets of the Constitution of India, for instance the abolition of untouchability and the principles of dignity and equality.

Laws prohibiting manual scavenging are, therefore, an important part of the statutory framework pertaining to the realisation of the right to sanitation. Dry latrines and the practice of manual scavenging have been prohibited explicitly at least since 1993. The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993 (1993 Act) prohibits the construction of dry latrines and the employment of manual scavengers for manually cleaning dry latrines.⁴² Keeping dry latrines and employing manual scavengers are criminal offences under the 1993 Act.⁴³ The Act further regulates the construction and maintenance of water-seal latrines.⁴⁴

The non-implementation of the 1993 Act by most of the state governments led to a public interest litigation being filed in the Supreme Court of India in 2003.⁴⁵ While the case was pending, a new law came into force in 2013—the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013 (2013 Act). The 2013 Act explicitly recognises that the 1993 Act had been inadequate ‘in eliminating the twin evils of insanitary latrines and manual scavenging’.⁴⁶

The 2013 Act addresses the issue in a more progressive way than the 1993 Act. First, it follows the 1993 Act in prohibiting dry latrines and manual scavenging.⁴⁷ This is relevant in the right to sanitation context because it, in effect, aims to eliminate an insanitary and inhuman practice of human excreta disposal. In addition to that, it prohibits employing people to clean septic tanks and sewers without protective gears or other safety measures.⁴⁸ Second, the 2013 Act requires

⁴² Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993, s 3.

⁴³ *ibid* s 14.

⁴⁴ *ibid* s 6. s 2(n) of the 1993 Act defines water seal latrine as a pour-flush latrine, water flush latrine or a sanitary latrine with a minimum water-seal of 20 millimetres diameter in which human excreta is pushed in or flushed by water.

⁴⁵ *Safai Karmachari Andolan v Union of India* (2014) 11 SCC 224 (Supreme Court of India).

⁴⁶ Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013, Preamble.

⁴⁷ *ibid* s 5.

⁴⁸ *ibid* s 2(1)(g).

the owner of a property where a dry latrine exists to demolish it or convert it into a sanitary latrine, which is a latrine that does not require human excreta to be cleaned or handled manually.⁴⁹ Third, the 2013 Act imposes a number of key sanitation-related obligations upon the government including local bodies, which include construction of community latrines where dry latrines have been demolished, maintenance of community latrines and the duty to make available appropriate technology to sanitation workers.⁵⁰

The provisions of the 2013 Act are directly linked to the realisation of the right to sanitation. It prohibits people from constructing and using a type of latrine (dry latrine) that results in violation of dignity and rights of many lower caste people and results in environmental pollution. A proper implementation of this law will have significant positive impact on the realisation of the right to sanitation in addition to the purpose of upholding the rights and dignity of manual scavengers.

D. RIGHTS OF SANITATION WORKERS

Sanitation workers play crucial role in the realisation of the right to sanitation and their rights are important concerns in the right to sanitation context. Sanitation workers face a number of issues, most importantly the issue of unsafe working conditions of sewage workers which leads to a number of occupational diseases and in some cases the death of workers.⁵¹ This is problematic from a right to sanitation point of view. A system where human beings are in direct contact with excreta amounts to violation of the right to sanitation. It is also unacceptable on the ground of violation of human dignity because the efforts or the system to realise the right to sanitation must not lead to violation of other basic rights, for instance the labour rights of sanitation workers.

The statutory framework does not adequately address the issues faced by sanitation workers. The rights of sewage workers are recognised to some extent in

⁴⁹ *ibid* ss 2(1)(e), 2(1)(o) and 4(1)(b).

⁵⁰ *ibid* s 4(1)(c) and 4 (3).

⁵¹ Praxis, 'Down the Drain: A Study on Occupational and Health Hazards and the Perils of Contracting Faced by Sewerage Workers in Delhi' (Praxis 2014).

the 2013 Act as this law prohibits manual entry into sewerage without adequate safety gears and devices.⁵² Further, the Rules adopted under this statute—the Prohibition of Employment as Manual Scavengers and their Rehabilitation Rules 2013—sets out the list of protective gears and safety devices to be provided to sewage workers.⁵³ Beyond this, there is no statutory protection of the rights of sanitation workers.

The rights of sanitation workers are not protected under existing labour laws. Laws such as the Factories Act 1948 are applicable to establishments with a minimum number of employees.⁵⁴ Sanitation workers are an unorganised class of workers in India and a vast majority of them are contract workers.⁵⁵ Factors such as these, amongst others, systematically deny legal protection to sanitation workers. The legal provisions also expose the irony that while some of these statutes provide for sanitation facilities for workers, they are silent on the rights of sanitation workers. The existing statutory framework recognises the rights of sanitation workers to some extent. However, their application is limited to sewage workers, not to the whole community of sanitation workers and their issues. The absence of broader statutory protection of the rights of sanitation workers has been filled to some extent by the higher judiciary. The judicial directives in this regard are discussed in detail in chapter seven and therefore not mentioned here. However, the issues faced by sanitation workers need a legal framework that covers all sanitation workers and all relevant rights of sanitation workers including their right to sanitation.

E. RIGHT TO SANITATION IN SPECIFIC CONTEXTS

There are other statutes that recognise the rights and duties related to sanitation in some specific contexts such as schools and workplaces. These statutes address some aspects of the right to sanitation, most notably access to basic sanitation

⁵² Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013, Explanation (b) to s 2(g).

⁵³ Prohibition of Employment as Manual Scavengers and their Rehabilitation Rules 2013, r 4-7

⁵⁴ Factories Act 1948, s 2(m).

⁵⁵ Praxis (n 51).

facilities. For example, the Right of Children to Free and Compulsory Education Act 2009 specifies separate toilets for girls and boys in schools.⁵⁶

Similarly, labour laws address the sanitation needs of workers in workplaces. It is mandatory for factories to provide separate latrines and urinals for male and female workers under the Factories Act 1948.⁵⁷ The Act also prescribes that latrines and toilets are to be kept clean. It is mandatory for factories to employ sweepers to clean latrines, urinals and washing places.⁵⁸ The Act entrusts state governments with the power to prescribe the number of toilets to be provided in factories in proportion to the number of male and female workers. It is the duty of the occupier of the factory to make effective arrangements for the treatment of wastes and effluents arising from the process carried out in the factory.⁵⁹

Other sector-specific labour laws too impose a duty on the employer to provide sanitation facilities to workers. For instance, the Contract Labour (Regulation and Abolition) Act 1970 imposes a duty on every contractor employing contract labourers to make available sufficient number of latrines and urinals for workers.⁶⁰ The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996 addresses the sanitation needs of construction workers. The Act makes it a duty of the employer to provide sufficient latrine and urinal facilities at workplace which can be accessible to workers at all times.⁶¹

A notable exception in regard to sector-specific laws for workers requiring facilities for sanitation is the Domestic Workers Welfare and Social Security Act 2010 because this Act is silent on sanitation needs of domestic workers despite the fact that domestic workers (predominantly women) face problems because of the difficulty in accessing sanitation facilities at houses they work and due to the

⁵⁶ Right of Children to Free and Compulsory Education Act 2009, Schedule read with s 19 and 25.

⁵⁷ Factories Act 1948, s 19.

⁵⁸ *ibid.*

⁵⁹ *ibid* s 12.

⁶⁰ Contract Labour (Regulation and Abolition) Act 1970, s 18.

⁶¹ Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996, s 33.

inadequate toilet facilities in public places.⁶²

Persons with disability are particularly vulnerable because of the lack of sanitation facilities suitable to their requirements. The Persons with Disabilities Act 2016 together with the rules made thereunder provides detailed standards on barrier free access to buildings which includes barrier free access to toilets.⁶³ The previous law contained similar provisions to protect the right to sanitation of persons with disabilities.⁶⁴ Fieldwork in all the three states revealed that basic sanitation facilities suitable for persons with disabilities hardly exist in rural areas. It appears that the statutes mentioned here are yet to make any difference on the field and therefore yet to contribute to the realisation of the right to sanitation of persons with disabilities.

II. POLICY FRAMEWORK

The policy framework has been predominantly regulating sanitation interventions in India. The norms and guidelines prescribed under the policy framework have greater impacts in the field when compared to the legal norms. Interactions with implementing agencies during the fieldwork revealed that they follow exclusively the norms and guidelines provided under the policy framework for all practical purposes. The policy framework, thus, seems to be the most important framework relevant for the realisation of the right to sanitation. The policy framework has been regulating rural and urban sanitation separately. The SBM introduced a change in this regard by bringing both rural sanitation and urban sanitation under one single programme. However, rural sanitation and urban sanitation are still governed under separate guidelines and different ministries have been given the duty to implement rural sanitation (Ministry of Drinking Water and Sanitation)

⁶² For a description of the plight of domestic workers in accessing toilets, *see* D Rajaramani et al, 'A Qualitative Study of Access to Sanitation Amongst Low-income Working Women in Bangalore, India' (2011) 1(1) *Journal of Water, Sanitation and Hygiene for Development* 432.

⁶³ See Rights of Persons with Disabilities Rules 2017, r 15. See also Harmonized Guidelines and Space Standards for Barrier Free Built Environment for Persons with Disability and Elderly Persons 2016.

⁶⁴ Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995, ss 18 and 44.

and urban sanitation (Ministry of Urban Development). Therefore, this part also follows the division. At the same time, there are some instruments that apply across the rural and urban sanitation sectors. Thus, the policy framework for school sanitation is described separately.

A. RURAL SANITATION

In India, rural sanitation has been a specific concern at least since the sixth Five-Year Plan (1980–85). The adoption of the CRSP in 1986 was one of the landmark initiatives in this regard. The CRSP was launched with the objective of improving the quality of life of the rural people and also to provide privacy and dignity to women.⁶⁵ It was a supply-oriented programme with focus on subsidy. This strategy was based on the premise that the availability of toilet would encourage people to use it and thereby sanitation goals can be achieved. The implementation of the CRSP followed the top-down command and control approach and the people who were supposed to enjoy the benefits of the scheme were not consulted. One critique thus observed that:

The CRSP was a classic example of a supply-driven programme, in which the state adopted a technological device and set out to engineer ‘sanitation for all’ by constructing it millions of times over...State budgets are used to employ contractors to build things about which the beneficiaries are not consulted, things which they may find useful or not but rarely regarded as ‘their own’.⁶⁶

Despite spending huge amount of money, the CRSP reportedly did not yield the desired result. Although more than 660 crore rupees was invested and over 90 lakh latrines were constructed, rural sanitation grew marginally at just one per cent annually throughout the 1990s.⁶⁷ Only 22 per cent of rural households had access to toilets by the late 1990s.⁶⁸ A study conducted during 1996–97 under the aegis of the Indian Institute of Mass Communication showed that 55 per cent of those with private toilets were self-motivated.⁶⁹ Only two per cent of the

⁶⁵ See Total Sanitation Campaign Guidelines 2011, para 1.

⁶⁶ M Black and B Fawcett, *The Last Taboo: Opening the Door on the Global Sanitation Crisis* (Earthscan 2008) 118.

⁶⁷ Water and Sanitation Programme (WSP), *A Decade of the Total Sanitation Campaign Rapid Assessment of Processes and Outcomes* (WSP and Ministry of Rural Development 2010) 24.

⁶⁸ *ibid.*

⁶⁹ Total Sanitation Campaign Guidelines 2011, para. 3.

households with toilets reportedly claimed the existence of subsidy as the major motivating factor, while 54 per cent claimed to have gone in for private toilets due to convenience and privacy.⁷⁰

This led to the adoption of a demand-driven strategy towards rural sanitation through the Total Sanitation Campaign (TSC).⁷¹ The TSC marks the beginning of a paradigm shift in rural sanitation policy in India. The goal of the TSC was to achieve universal rural sanitation coverage by 2012. The primary focus was diverted to ‘software’ (community mobilisation and awareness creation) and ‘hardware’ (infrastructure and construction) became the second priority.

The policy framework for rural sanitation underwent several shifts in subsequent years. In 2012, the Nirmal Bharat Abhiyan (NBA) replaced the TSC.⁷² In 2014, the Swachh Bharat Mission (SBM) replaced the NBA.⁷³ A significant shift with the SBM is that it addresses both rural (SBA-Gramin) and urban sanitation (SBM-Urban) under a single programme. In effect, in the rural sanitation context, the NBA is replaced by the SBM-Gramin.

At the national level, since the adoption of the TSC, the policy framework for rural sanitation has been following the community-led demand-driven approach to achieve the goal of total sanitation. One of the major focuses has been the efforts to create awareness and to motivate people build toilets. It is known in the sanitation policy framework as Information, Education and Communication (IEC). The idea of ‘subsidy’ has thus been replaced by ‘incentive’. The financial assistance sanctioned under the policy framework is available to individuals, in principle, as an ‘incentive’ for constructing and using household toilets and not as a ‘subsidy’ to construct toilets. However, this approach has been diluted under the SBM by relaxing the incentive norm, that is, by giving discretion to state

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² Ministry of Drinking Water and Sanitation, DO No. W.11013/5/2012-CRSP (13 July 2012) <http://mdws.gov.in/hindi/sites/upload_files/ddwshindi/files/pdf/TSC%20as%20NBA.pdf>.

⁷³ Ministry of Drinking Water and Sanitation, DO No. W 11013/08/2014 (30 September 2014) <www.mdws.gov.in/sites/upload_files/ddws/files/pdf/Restructuring_of_NBA.pdf>.

governments to provide part of the financial assistance in advance.⁷⁴ Thus, the SBM-Gramin follows a mixed approach that combines both the elements of subsidy and incentive.

The policy framework for rural sanitation to some extent has adopted the principles of the CLTS approach.⁷⁵ Most importantly, the policy framework for rural sanitation has shifted its focus from subsidy to incentives and has started significantly focusing on awareness creation to motivate people to give-up the practice of open defecation. At the same time, it does not follow the CLTS approach completely. It still is by and large a government-driven top-down initiative and it still focuses on incentive at the individual level. Both these features are in sharp contrast with the fundamentals of the CLTS approach, which believe in community-driven initiatives and is against the idea of external agencies including the government being prescriptive.⁷⁶

The incentive scheme also recognised collective achievements in the rural sanitation sector. Thus, an incentive programme known as the Nirmal Gram Puraskar (NGP) was introduced in 2003.⁷⁷ The NGP offered a cash prize to motivate GPs to achieve total sanitation. However, the NGP failed to address the sustainability⁷⁸ aspects.⁷⁹ This led to the issue of slip backs in several of the NGP

⁷⁴ Swachh Bharat Mission (Gramin) Guidelines 2014, para 4.6.

⁷⁵ For details on CLTS approach, see K Kar, Practical Guide to Triggering Community-Led Total Sanitation (CLTS) (Institute of Development Studies 2005).

⁷⁶ L Mehta, 'Introduction: Why Shit Matters: Community-led Total Sanitation and the Sanitation Challenge for the 21st Century' in L Mehta and S Movik eds, *Shit Matters: The Potential of Community-Led Total Sanitation* (Practical Action Publishing 2011) 3–4.

⁷⁷ Nirmal Gram Puraskar Guidelines 2012.

⁷⁸ The term 'sustainability' used in this thesis denote mainly two aspects. First, it denotes the continuous use and maintenance of existing sanitation facilities such as toilets and handwashing facilities by individuals and communities. It also denotes the situation where individuals follow hygiene practices such as handwashing. Second, the term is also used in the context of the impact of insanitation or certain sanitation practices on the quality of environment. Both these aspects are relevant in the context of the conceptualisation and realisation of the right to sanitation.

⁷⁹ A Dyalchand et al, 'Institutional Arrangements and Social Norms Influencing Sanitation Behaviour in Rural India' in L Mehta and S Movik eds, *Shit Matters: The Potential of Community-Led Total Sanitation* (Practical Action Publishing 2011) 108.

villages and probably due to this reason, the Union Government decided to discontinue it.⁸⁰

The rural sanitation policies envisage implementation of the schemes through local bodies. The responsibility for delivering the programme goals rests with local governments (PRIs) with significant involvement of communities.⁸¹ The Union Government and state governments have a facilitating role that takes the form of framing enabling policies, providing financial and capacity-building support, and monitoring progress.

The SBM-Gramin has introduced a few significant changes when compared to the previous two flagship programmes on rural sanitation—TSC and NBA. First, it does not deal with all aspects of sanitation. Two key components—school sanitation and sanitation in anganwadi centres—which were part of the erstwhile rural sanitation programmes have been taken out of the purview of SBM-Gramin. The responsibility of school sanitation and sanitation in anganwadi centres has now been vested with the Ministry of Human Resource Development and the Ministry of Women and Child Development respectively.

Second, lack of sustainability was a key criticism against the previous rural sanitation programmes. The TSC and the NBA had almost exclusively focused on toilet construction. There was little focus on, and virtually no mechanism to ensure, sustainability of the toilets constructed. This has resulted in leaving a staggering number of toilets unused and people continued open defecation despite having a toilet at home.⁸² A number of reasons have been cited for this phenomenon including the unacceptable design of the toilets, non-availability of water supply, people's reluctance to give up their habit (particularly of elderly people) and people's perception of open defecation as a better option in terms of

⁸⁰ Discontinuation of Nirmal Gram Puraskar (NGP) Scheme, Ministry of Drinking Water and Sanitation, Doc No S-11011/7/2015-SBM (6 November 2015). See also A Hueso and B Bell, 'An Untold Story of Policy Failure: the Total Sanitation Campaign in India' (2013) 15 *Water Policy* 1001.

⁸¹ Swachh Bharat Mission (Gramin) Guidelines 2014, para 8.

⁸² A Gupta et al, 'Revealed Preference for Open Defecation: Evidence from a New Survey in Rural North India' (2014) 49(38) *Economic and Political Weekly* 43.

health and aesthetic factors.⁸³ The SBM-Gramin seeks to address this issue by prescribing the monitoring of both outputs (construction) and outcomes (usage).⁸⁴

Third, the mechanism of funding or financial assistance from multiple sources no longer exists under the SBM-Gramin. Under the NBA, financial assistance (rupees 5400) was made available for the construction of household toilets through rural employment guarantee scheme.⁸⁵ This money was in addition to the financial assistance available under the NBA (rupees 4600). While the additional money available was a huge help to the poor people, there was rampant complaint on the unreasonable delay in getting that money.⁸⁶ The SBM-Gramin introduced a change by discontinuing this mechanism and currently the financial assistance (rupees 12,000) is exclusively from the SBM-Gramin.⁸⁷ While there is no formal link between the SBM-Gramin and rural employment guarantee schemes, the Ministry of Rural Development of the Union Government has committed separately to improve the rural sanitation scenario mainly through the construction of household toilets under Mahatma Gandhi National Rural Employment Guarantee Act 2005.⁸⁸

Fourth, MHM is an issue that has gradually received more attention in the rural sanitation context. The policy framework for rural sanitation was silent on MHM until recently. For instance, the NBA Guidelines 2011 did not mention MHM and the issue was subsequently included through an amendment.⁸⁹ In 2015, the Union Government took a more expansive approach by adopting a specific document on MHM.⁹⁰ It provides a conceptual framework for MHM and emphasises the duty

⁸³ *ibid*; see also S Sengupta, *Clean Up Your Act: The State of Sanitation in India* (Centre for Science and Environment 2016).

⁸⁴ Swachh Bharat Mission (Gramin) Guidelines 2014, para 3.3.

⁸⁵ MGNREGA Guidelines (Revised) for Taking up Works Relating to Access to Sanitation Facilities, 2012.

⁸⁶ Swachh Bharat Mission (Gramin) Guidelines 2014, para 1.4.

⁸⁷ *ibid*.

⁸⁸ Action Plan for Swachh Bharat Mission under MNREGA, MoRD Notification No J-11017/41/2011-MGNREGA (19 January 2015).

⁸⁹ Modification in Nirmal Bharat Abhiyan Guidelines Including Activities Related to Menstrual Hygiene Management as a Permissible Activity, Doc No W.11013/16/2013-NBA (Part) (10 December 2013).

⁹⁰ Menstrual Hygiene Management: National Guidelines 2015.

of the government to promote awareness creation as well as to facilitate access to necessary infrastructure and products such as separate toilets, affordable and accessible absorbents, water, soap and mechanism for safe disposal of used absorbents.⁹¹ The issue of MHM is also addressed under the National Rural Health Mission—an initiative by the Ministry of Health and Family Welfare of the Union Government.⁹² It also follows the same conceptual framework and the mode of interventions, that is, the supply of low cost sanitary napkins to adolescent girls in the age group of 10–19 years (a packet of six napkins for rupees six). It promotes door-to-door supply and supply through the platform of schools and anganwadi centres.⁹³ The efforts in this regard have already been reportedly initiated in some states. For instance, some states have provided sanitary vending machines and facilitated the setting up of sanitary napkin production centres.⁹⁴

While the policy framework adopted by the Union Government dominates the rural sanitation sector, some state governments have adopted separate policy framework. For instance, the State of Rajasthan has adopted the Rajasthan Rural Sanitation and Hygiene Policy 2011—a framework exclusively for rural sanitation. The policy focuses on the twin objectives of management of human excreta and management of solid and liquid waste.⁹⁵ The policy calls for prioritising the goal of elimination of open defecation followed by two other objectives, which is promotion of hygiene practices and management of solid and liquid waste.⁹⁶ It also emphasises the protection of human rights mainly safety, security, privacy, and dignity particularly of women and children as a principle to be followed.⁹⁷ Although not specific to rural sanitation, the state of Punjab has adopted the Punjab Rural Water Supply and Sanitation Policy 2014—a policy common to water supply and sanitation in rural areas. An important feature of the Punjab

⁹¹ *ibid* 6.

⁹² Scheme for Management of Menstrual Hygiene among Adolescent Girls in Rural India, Ministry of Health and Family Welfare, DO No M/12015/103/2010-MCH (4 Mach 2016).

⁹³ *ibid*.

⁹⁴ Government of India, Country Paper—India, SACOSAN-VI, Dhaka (11-13 January 2016).

⁹⁵ Rajasthan Rural Sanitation and Hygiene Policy 2011, para 3.

⁹⁶ *ibid* para 4.

⁹⁷ *ibid*.

policy from a right to sanitation point of view is that it underlines the importance of environmental aspects of sanitation and grievance redressal.⁹⁸ Not many states have adopted a separate state-level policy framework for rural sanitation. Therefore, the policy framework adopted by the Union Government continues to be the most relevant framework in the rural sanitation context.

B. URBAN SANITATION

Urban sanitation has been a focus of policy attention at least since the colonial period although the main purpose was to protect British citizens and officials of the colonial government, for instance the Army, from the threat of various sanitation-related diseases.⁹⁹ After independence, the government focused on various sectors such as agriculture and industrial development; sanitation was not in the first few priorities. The fund allocation for urban water supply and sanitation since the adoption of the Five-Year Plans (FYPs) illustrates the low priority received by the sector. The fund allocation remained almost the same from the first FYP (1951–56) to the eighth FYP (1992–97). It was increased during the ninth FYP (1997–2002) to 2.17 per cent of the total fund when compared to the 1.28 per cent allotted during the first plan.¹⁰⁰ The fund allocation may not actually reflect the exact amount of money allotted or spent for sanitation because sanitation was always clubbed with water supply and a majority of the total fund allotted was probably spent on water supply.

The Union Government began paying specific attention to urban sanitation in the early 1980s when the Ministry of Housing and Poverty Alleviation adopted the scheme of Integrated Low Cost Sanitation scheme (ILCS).¹⁰¹ The focus of ILCS was limited to the provisioning of toilet for economically weaker sections of the urban population.¹⁰² The major objective was to facilitate the conversion of dry

⁹⁸ Punjab Rural Water Supply and Sanitation Policy 2014, para 7.

⁹⁹ SE Chaplin, *The Politics of Sanitation in India: Cities, Services and the State* (Orient Longman 2012) 40.

¹⁰⁰ *ibid* 66.

¹⁰¹ Integrated Low Cost Sanitation Scheme Guidelines 2012 (modified).

¹⁰² *ibid* 2.

latrines into sanitary twin pit pour flush toilets for the economically weaker section households.¹⁰³ The ILCS was revised from time to time and it continued to the 12th FYP until the adoption of the SBM-Urban in 2014.

The urban sanitation sector witnessed drastic changes in the mid 2000 onwards. First, in 2005, two programmes—Jawaharlal Nehru National Urban Renewal Mission (JNNURM) and the Urban Infrastructure Development Scheme for Small and Medium Towns (UIDSSMT)—were adopted to facilitate significant increase in the investment for urban development including urban sanitation. These programmes were designed on the premise of the lack of adequate infrastructure in urban areas and included sanitation components such as sewerage and solid waste management infrastructure.¹⁰⁴ They were meant to channelise the investment for urban infrastructure including sanitation-related infrastructure.¹⁰⁵ Thus, from a sanitation perspective, these programmes focussed on the construction of new or up-gradation of the existing sewerage systems and sewage treatment plants.¹⁰⁶ From a policy perspective, JNNURM and UIDSSMT were meant to initiate reforms in urban governance and it included reforms relevant in the right to sanitation context, for instance the idea of private sector participation in service delivery and full cost recovery.¹⁰⁷

Second, this period also marked the adoption of a comprehensive policy on urban sanitation—the NUSP, which follows a comprehensive concept of sanitation inclusive of public health and environmental dimensions of sanitation. Aligning with the approach of JNNURM and UIDSSMT, NUSP too promotes public-private partnerships and full cost recovery.¹⁰⁸ The NUSP requires each city to

¹⁰³ *ibid* 3–4.

¹⁰⁴ Jawaharlal Nehru National Urban Renewal Mission (JNNURM), Revised Guidelines (Submission for Urban Infrastructure and Governance) 2011; Urban Infrastructure Development Scheme for Small and Medium Towns Guidelines 2005.

¹⁰⁵ K Wankhade, ‘Urban Sanitation in India: Key Shifts in the National Policy Frame’ (2015) 27(2) *Environment and Urbanization* 555, 566.

¹⁰⁶ *ibid* 567.

¹⁰⁷ *eg* Jawaharlal Nehru National Urban Renewal Mission (JNNURM), Revised Guidelines (Submission for Urban Infrastructure and Governance) 2011, Annexure II, para 1.1 (cost recovery), para 2 (PPP).

¹⁰⁸ National Urban Sanitation Policy 2008, Full cost recovery in Annexure I.

prepare a city sanitation plan suitable to the local situations and needs.¹⁰⁹ It also emphasises the needs of the urban poor and most importantly calls for the provisioning of sanitation facilities for the urban poor regardless of the land rights.¹¹⁰ The focus on infrastructure and investment continues, albeit through different programmes such as the Atal Mission Rejuvenation and Urban Transformation and the Smart Cities Mission which have sanitation (more precisely sewerage and waste management) as an important component.¹¹¹

The latest development from a policy point of view is the adoption of the SBM-Urban. Currently, the SBM-Urban and the NUSP together constitute the key policy framework for urban sanitation. The SBM-Urban sets important goals such as the elimination of open defecation, conversion of insanitary toilets to pour flush toilets, eradication of manual scavenging and management of waste.¹¹² It emphasises the importance of prioritising the sanitation needs of the vulnerable sections of the society such as pensioners, girl children, and pregnant and lactating mothers.¹¹³ Further, it underlines the need to make available sanitation facilities to the marginalised sections of the society such as migrant labourers, homeless and people living in urban slums.¹¹⁴ It also provides for public toilets and community toilets.¹¹⁵ The SBM-Urban Guidelines take note of the obstacles faced by the people living in urban slums in accessing various public services and it explicitly calls for delinking access to sanitation services from land tenure.¹¹⁶ It recognises the need for water supply for the sustainability of sanitation infrastructure has been recognised and thus provides that household toilets are to

¹⁰⁹ *ibid* Annexure I.

¹¹⁰ *ibid*.

¹¹¹ Atal Mission Rejuvenation and Urban Transformation—Mission Statement and Guidelines 2015; Smart City—Mission Statement and Guidelines 2015.

¹¹² Swachh Bharat Mission (Urban) Guidelines 2014, para 2.3.

¹¹³ *ibid* para 2.5.5.

¹¹⁴ *ibid*. see also SL Murthy, 'Land Security and the Challenges of Realizing the Human Right to Water and Sanitation in the Slums of Mumbai, India' (2012) 14(2) *Health and Human Rights* 61; C McFarlane, 'Sanitation in Mumbai's Informal Settlements: State, 'Slum' and Infrastructure' (2008) 40(1) *Environment and Planning* 88

¹¹⁵ *ibid*.

¹¹⁶ Swachh Bharat Mission (Urban) Guidelines 2014, para 4.3.2.

be built in tandem with water supply.¹¹⁷ It also addresses sustainability concerns are also addressed by including a grant to ULBs, which focuses on outcomes including elimination of open defecation, eradication of manual scavenging and controlling the environmental pollution in addition to constructing sanitation infrastructure.¹¹⁸

Urban sanitation governance is undergoing constant transformation. The Union Government is currently in the process of adopting a policy to address the issue of faecal sludge.¹¹⁹ This is particularly relevant in a context when septage management is an emerging concern and challenge in the urban sanitation context.

The policy framework for urban sanitation is comparatively progressive from a right to sanitation perspective. It addresses some of the important concerns from a right to sanitation point of view. For instance, it recognises sanitation needs of the vulnerable and the marginalised groups. Further, it does not seem to consider the policy framework as a self-contained framework. It establishes a link with relevant laws, for instance it refers to relevant instruments such as the rules related to management of municipal solid waste and manuals adopted by the Central Public Health and Environmental Engineering Organisation (CPHEEO).¹²⁰ However, it is still far from explicitly transforming itself into a framework based on the right to sanitation. For instance, the SBM-Urban Guidelines do not recognise sanitation as a right and does not provide mechanism to ensure accountability.

Parallel to the policy framework at the national level, certain state governments have adopted a distinct state-level policy frameworks. Some state-level instruments focus primarily on promoting or paving the way for private sector

¹¹⁷ *ibid* para 4.2.3.

¹¹⁸ *ibid* para 10.3. See also Ministry of Urban Development, Annual Report 2016–17, 25 <<http://moud.gov.in/upload/uploadfiles/files/annual%20report%20English%20-%20print.pdf>>.

¹¹⁹ Ministry of Urban Development, Advisory Note: Septage Management in Urban India, 2013; Ministry of Urban Development, Draft National Urban Faecal Sludge and Septage Management (FSSM) Policy (28 February 2017).

¹²⁰ Swachh Bharat Mission (Urban) Guidelines 2014, para 7.4. The CPHEEO is technical wing of the Ministry of Urban Development, Government of India, and deals with the matters related to urban water supply and sanitation including solid waste management

participation in sanitation services.¹²¹ Some others are progressive to the extent to which they underline certain important concerns in the right to sanitation context such as the importance of public health and environmental concerns,¹²² recognition of the right of the urban poor to access sanitation services,¹²³ the need to address social and occupational hazards faced by sanitation workers,¹²⁴ and the need for further clarity in law on responsibilities of individuals and ULBs.¹²⁵

C. SCHOOL AND ANGANWADI SANITATION—POLICIES TRANSCENDING THE RURAL-URBAN DIVIDE

Sanitation facilities in schools and anganwadi centres were important integrated components of sanitation interventions in rural and urban areas until the adoption of SBM.¹²⁶ In addition to that, school sanitation has also been a component under Sarva Siksha Abhiyan—a flagship programme of the Union Government for universal elementary education since 2000.¹²⁷ The SBM introduced a change in this approach by transferring the responsibility of school sanitation and sanitation in anganwadi centres to the Union Ministry of Human Resource development and the Union Ministry of Woman and Child Development respectively.¹²⁸

School sanitation has progressively received special attention at the national level and this led to the adoption of a specific policy document on school sanitation—Swachh Bharat Swachh Vidyalaya—A National Mission 2014.¹²⁹ It prescribes a minimum number of separate toilets and urinals for boys and girls. The ratio to be maintained is preferably one unit for every 40 students.¹³⁰ Hygiene, particularly the facilities for hand washing, is another major component of school sanitation. Swachh Bharat Swachh Vidyalaya—A National Mission Guidelines envisages

¹²¹ Karnataka Urban Drinking Water and Sanitation Policy 2003.

¹²² Odisha Urban Sanitation Strategy 2011, para F(a).

¹²³ *ibid* para F(b). See also Uttar Pradesh Urban Sanitation Policy 2009, para 3.

¹²⁴ Uttar Pradesh Urban Sanitation Policy 2009, para 3.

¹²⁵ *ibid* para 9.

¹²⁶ eg Nirmal Bharat Abhiyan Guidelines 2012, paras 5.8.2 and 5.8.5.

¹²⁷ For details, see Sarva Siksha Abhiyan—Framework for Implementation (Ministry of Human Resource and Development 2011).

¹²⁸ Swachh Bharat Mission (Urban) Guidelines 2014, para 1.2.

¹²⁹ Swachh Bharat Swachh Vidyalaya—A National Mission 2014.

¹³⁰ *ibid* 17.

hand-washing facilities that allow 10-12 students to wash their hands at a time.¹³¹ It specifically calls for at least one incinerator in a girl's toilet block and niche to keep sanitary napkins as essential components of toilets.¹³²

The importance given to school sanitation is further clear from the fact that the Union Government has instructed the state governments to prioritise the provisioning of sanitation facilities in schools and anganwadis while utilising the available grants including the grant under the Fourteenth Finance Commission.¹³³ Further, the Ministry of Human Resource Development has introduced an incentive scheme for government schools to reward their sanitation achievements.¹³⁴

The policy framework for school sanitation is one of the few instruments in the sanitation context that explicitly recognises sanitation as a right. The Swachh Bharat Swachh Vidyalaya—A National Mission Guidelines recognises school sanitation as an essential part of the right to education recognised under the Constitution of India¹³⁵ and the Right of Children to Free and Compulsory Education Act 2009.¹³⁶ It further takes into consideration the directives issued by the Supreme Court of India in a case concerning the right to education wherein the Court issued specific direction to state governments to make available water supply and sanitation facilities at schools.¹³⁷

There is no specific policy document on sanitation in anganwadi centres. However, provisioning of toilets at anganwadi centres is now an integral component of the

¹³¹ See also Guidelines on Food Safety and Hygiene for School Level Kitchens under Mid-Day Meal (MDM) Scheme 2015 <http://mhrd.gov.in/sites/upload_files/mhrd/files/document-reports/Guidelines__Food_Safety_and_Hygiene.pdf>.

¹³² Swachh Bharat Swachh Vidyalaya—A National Mission 2014, 25.

¹³³ Ministry of Human Resource Development, Order No F.27-97/2015-EE.16 (13 April 2016) <http://mhrd.gov.in/sites/upload_files/mhrd/files/ffc.pdf>.

¹³⁴ Swachh Vidyalaya Puraskar 2016 <http://mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/Swachh_Vidyalay_Puraskar_Guidelines.pdf>.

¹³⁵ See Constitution of India 1950, art 21-A.

¹³⁶ Swachh Bharat Swachh Vidyalaya—A National Mission 2014, 7.

¹³⁷ *ibid.*

Integrated Child Development Services Scheme—a flagship programme of the Union Government for early childhood care and development since 1975.¹³⁸

III. LAW-POLICY INTERFACE, ENFORCEMENT, AND ACCOUNTABILITY

The lack of a comprehensive statutory framework on sanitation apparently led to the domination of the policy framework in the governance of sanitation interventions in India. This led to serious implications for accountability and transparency. Given the fact that the policy framework does not provide mechanisms to ensure accountability and remedies, right-holders are left with the inadequate mechanisms available under the existing statutory framework or to approach the higher judiciary under the writ jurisdiction. Thus, the existing statutory and policy framework for sanitation provides little scope for ensuring accountability and claiming the right to sanitation.

A. DOMINATION OF POLICIES, ACCOUNTABILITY GAP AND DEMOCRACY DEFICIT

State governments are yet to adopt a single overarching law that addresses all the aspects of sanitation. Therefore, the statutory framework concerning sanitation comprises of different statutes addressing different issues or different dimensions of sanitation. The piecemeal nature of the statutory framework has led to the regulation of sanitation interventions in India predominantly by the policy framework. For example, sanitation interventions in rural areas have been governed over the last couple of decades primarily through administrative directions of the Union Government. This includes the CRSP launched in 1986 and the subsequent programmes adopted from time to time. Similarly, in the case of urban sanitation, the NUSP and the SBM-Urban Guidelines constitute the main governing framework.

¹³⁸ Ministry of Women and Child Development, Toilets in Angawadi Centres (11 December 2014) <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=113141>>. See also Guidelines on Flexi-Activities and Utilization of Flexi-Funds ICDS Systems Strengthening and Nutrition Improvement Project (ISSNIP), Doc No 29/83/2016–WBP (15 December 2016).

The Union Government has been using the policy framework as a tool to push state governments to implement sanitation interventions. Given the fact that the policy framework provides fund to state governments, it is not surprising that they have become the principal source of operational norms insofar as the implementation of sanitation interventions is concerned.

A major implication of the regulation of sanitation interventions through the policy framework is that the executive could change or modify them according to its will. This is, for instance, clear from the fact that the policy framework for rural sanitation was changed three times since the adoption of the CRSP in 1986.¹³⁹ This is the primary difference when compared to laws because modification of laws requires the prescribed procedure to be followed. Most importantly, it involves discussion and debate among democratically elected representatives of the people. In fact, the Union Government has been using this flexibility to change the policy sanitation from time to time without having to discuss it in democratic forums, for instance Parliament.

The flexibility offered by the policy framework per se is not a problem. In fact, it provides an opportunity to introduce changes to suit the emerging needs and circumstances. At the same time, it has implications for the democratic process and human rights, which cannot be overlooked. Some of these policy shifts may have implications for basic human rights such as the rights to sanitation and health and therefore require in-depth discussion among the general public and the elected representatives of the people. For instance, a shift from the supply-oriented approach to the demand-oriented approach as adopted in the case of the framework for rural sanitation may have serious implications for the role of the State. Issues such as these are to be discussed by the elected representatives of the people so that the will of people can be brought in. The present framework based on policy instruments is devoid of such a democratic process and therefore lacks legitimacy.

¹³⁹ Following are the key programmes in the rural sanitation context in the last couple of decades: Central Rural Sanitation Programme (1986), Total Sanitation Campaign (1999); Nirmal Bharat Abhiyan (2012); Swachh Bharat Mission—Gramin (2014).

The fact that the policy framework predominantly regulates sanitation interventions in India comes at the cost of rights and concerns regarding accountability. In fact, the existing framework leaves the implementation of a fundamental right completely to a framework that is silent on rights, entitlements and accountability mechanisms. The policy framework for sanitation seeks to achieve a set of targets in a time-bound manner (eg to achieve ODF status) and treats citizens as beneficiaries. The language of rights and entitlements is generally absent in the policy framework. In fact, a rights-based approach to socio-economic rights and goals are not uncommon in India, for instance the framework related to food security and rural employment.¹⁴⁰

There could be two explanations for this silence. First, it is probable that the policy makers were not aware of the existence of the right to sanitation. In fact, a number of state level government officials and representatives of NGOs and international organisations admitted during fieldwork that they are not aware of the development of the right to sanitation. This issue points to the need for more efforts to educate the policy makers and implementing agencies about existence, nature and scope of the right to sanitation. Second, it could be a deliberate step by the government to avoid questions on accountability and rights-based claims by individuals.

Given the fact that the Constitution of India has been interpreted to recognise the right to sanitation as part of the fundamental right to life, it is inappropriate to leave its implementation completely to programmes and schemes that do not recognise the right explicitly. It is also inappropriate to leave the realisation of a fundamental right completely to a framework that is not justiciable and that do not follow a rights-based approach.

¹⁴⁰ See National Rural Employment Guarantee Act 2005; National Food Security Act 2013.

B. ENSURING ACCOUNTABILITY AND ENFORCEMENT: OPPORTUNITIES AND LIMITATIONS IN LAW

Recognising a right is an important step. An equally important step is to make available a mechanism to ensure accountability of the duty-bearers and to create an institutional atmosphere where right-holders are able to realise their rights. Given the fact that the policy framework that predominantly governs the sanitation sector does not provide a mechanism to ensure accountability, this section examines the accountability mechanisms available under the existing statutory framework that are relevant in the right to sanitation context. This section is divided into two parts. The first part examines the accountability mechanism envisaged under relevant statutes, while the second part examines the role of the judiciary in facilitating the realisation of the right to sanitation.

1) Accountability mechanism under the statutory framework

Accountability mechanisms envisaged under different statutes are different in nature and scope. There are broadly two kinds of mechanisms available under the existing statutory framework—a general mechanism that seeks to ensure accountability of all government institutions and officers and a mechanism envisaged under a specific statute.

The system of a general mechanism is relevant in the context of statutes that are silent on any kind of accountability mechanism. For instance, water supply and sewerage laws adopted by some of the states are generally silent on mechanisms to ensure accountability of implementing agencies. They merely establish institutions and empower them to carry out functions. At the best, these laws define responsibilities of individuals to comply with any direction issued by the institution.¹⁴¹

One of the key mechanisms to ensure accountability in this regard is the office of Lokayukta. A number of states have adopted laws to establish Lokayukta and Up-

¹⁴¹ eg Goa Sewerage System and Sanitation Services Management Act 2008.

Lokayukta.¹⁴² The mandate of this body is limited to the issue of maladministration and corruption of government officers including the office-bearers of local bodies. Lokayukta has the power to conduct investigation and also has the power to direct the concerned officer or authority to provide remedies in case of injustice caused due to corruption or maladministration.¹⁴³ The competent authority against whom a direction has been made by Lokayukta is duty bound to submit a report detailing the actions taken as per the direction.¹⁴⁴ Even though this mechanism may be useful to fight corruption and maladministration, it may not help to claim rights including the right to sanitation. This mechanism may be useful to make various government agencies including local bodies involved in sanitation-related work accountable for the work they undertake. This may be useful to ensure transparency particularly in the context of the use of public fund.

The law guaranteeing a right to services is another framework relevant in the context of accountability. At least a few states have adopted such a law.¹⁴⁵ The basic structure of such a law is the provision of information to citizens about the services they are entitled to. In addition to that, such laws specify the officers responsible for providing the services and recognises the right of citizens to obtain such services within a ‘stipulated time period’.¹⁴⁶ They also establish a grievance redressal system.¹⁴⁷

While the law guaranteeing a right to services may be useful to claim sanitation-related services, such a law is not applicable to sanitation services by default. It is applicable to those services, which are notified by the concerned state government or by the concerned department or agency as prescribed under the Act.¹⁴⁸ Thus, the relevance of this law in the sanitation context arises only if sanitation-related

¹⁴² eg Uttar Pradesh Lokayukta and Up-Lokayukta Act 1975; Kerala Lok Ayukta Act 1999; Delhi Lokayukta and UpLokayukta Act 1995.

¹⁴³ eg *ibid* s 2(b); Kerala Lok Ayukta Act 1999, s 2(b).

¹⁴⁴ eg *ibid* s 12; Kerala Lok Ayukta Act 1999, s 12.

¹⁴⁵ eg Kerala (Kerala State Right to Service Act 2012), Uttar Pradesh (Uttar Pradesh Janhit Guarantee Adhyadesh 2011).

¹⁴⁶ eg Rajasthan Guaranteed Delivery of Public Services Act 2011, ss 4 and 5; Kerala State Right to Service Act 2012, s 6.

¹⁴⁷ eg *ibid* s 6; Kerala State Right to Service Act 2012.

¹⁴⁸ eg *ibid* s 3; Kerala State Right to Service Act 2012, s 3.

services have been brought under the purview of it. There is a wide variation in the number of services brought under the purview of different laws.¹⁴⁹ For example, while sewerage connection is a guaranteed service under the Kerala law¹⁵⁰, sanitation-related services are missing in the list of services notified under the Rajasthan law¹⁵¹ and the Delhi law.¹⁵² This is an issue on which civil society groups working on sanitation can generate public opinion and engage in advocacy with the government to notify sanitation services under laws relating to the right to services.

Some of the statutes that recognise sanitation-related rights provide some kind of internal mechanism to ensure accountability and remedies. For example, inspectors appointed under the Factories Act 1948 have the power to examine the factory premises. Workers have an explicit right to approach the Inspectors with their grievances.¹⁵³ Similarly, the Right of Children to Free and Compulsory Education Act 2009 Act envisages the local authority with administrative control over a school to function as the grievance redressal forum.¹⁵⁴ The Rights of Persons with Disabilities Act 2016 also provides institutional mechanisms to look into complaints of violation of the rights of disabled people, which include the right to access to barrier-free sanitation facilities.¹⁵⁵ Right-holders entitled under these statutes may approach the respective forums to get their right to sanitation as enshrined under the relevant statute enforced.

Ombudsmen appointed under the laws governing local bodies is another potential forum that provides a platform for citizens to approach with their grievance against local bodies. This may be useful in the case of failure of local bodies, for

¹⁴⁹ For comparison of laws on right to services in different states, see SK Agarwal, *Right to Public Services: A Guide* (Transparency International India 2012).

¹⁵⁰ Kerala Right to Services Act 2012. Kerala Water Authority has issued a notification listing the services that come under the purview of this law and the list includes sewerage services.

¹⁵¹ For list of services notified under Rajasthan Guaranteed Delivery of Public Services Act 2011, see <www.ard.rajasthan.gov.in/Notified%20Services%20updated%202013-10-11-Press.pdf>.

¹⁵² The latest list of services notified under Delhi (Right of Citizen to Time Bound Delivery of Services Act 2011 is available at <http://delhi.gov.in/DoIT/DoIT_IT/PDF/esla_120914.pdf>.

¹⁵³ Factories Act 1948, s 111A.

¹⁵⁴ Right of Children to Free and Compulsory Education Act 2009, s 32.

¹⁵⁵ Rights of Persons with Disabilities Act 2016, s 23 (Grievance Redressal Officer); s 75(1)(b) (function of the Chief Commissioner); s 80(b) (function of state commissioners).

instance panchayat at various levels, in fulfilling their legal duties relating to sanitation. Even though the Union Government has been pushing state governments to establish a system of local body ombudsmen, very few states have so far enacted laws for this purpose.¹⁵⁶

The general laws as mentioned above are welcome steps as they help right-holders to claim their rights howsoever limited may be the scope of these laws. However, it does not fill the gap of an institutional mechanism under the framework for sanitation to ensure accountability of the duty-bearers and remedies to the right-holders.

2) Realising the right through judicial interventions

The legal duties envisaged under various statutes and the legal duties of the State emanating from the right to sanitation as recognised in the Constitution of India are indeed legally enforceable. There are several instances wherein the existing laws have been used by individuals and organisations to enforce their right to sanitation. Some of these cases are directly related to the right to sanitation or some of the elements of the right to sanitation and they are discussed here to illustrate the way in which right-holders have taken recourse to courts to enforce their right.

In *Ahammed Kabeer*,¹⁵⁷ rights and duties related to sanitation came up for discussion before the High Court of Kerala. The litigation began when a Health Inspector issued a notice to the petitioner to construct a soak pit covered by a slab in his property to discharge the sullage water from his house. The Panchayat machinery acted upon complaints from other residents in the locality citing public nuisance. The petitioner wanted to discharge the sullage into the nearby sewerage due to lack of space to build a soak pit in his premise. The petitioner accordingly sought the permission to lay a pipe. The Panchayat refused the permission, which

¹⁵⁶ eg Kerala Panchayati Raj Act 1994, s 271 (J); Karnataka Panchayat Raj Act 1993, ss 296-A, 296-B and 296-C. See also Government of India, 13th Finance Commission Report 2010–2015 (Government of India 2009) 178.

¹⁵⁷ *A Ahammed Kabeer v Pudunagaram Grama Panchayath*, Writ Petition (Civil) No 26997 of 2006(L), Judgment of 17 January 2007 (High Court of Kerala).

the petitioner challenged through a writ petition. The Court dismissed the case on procedural grounds and directed the petitioner to approach the appropriate authorities under the Kerala Panchayat Raj Act. However, it is to be noted that the Panchayat admitted before the Court its legal responsibility to provide sanitation facilities under law and explained to the court the initiatives taken to fulfil this responsibility. This is an example where people compel the responsible government agency to explain the actions taken for the realisation of the right to sanitation.

There are several instances where citizens' group have used the law to force the government or local bodies to fulfil their sanitation-related responsibilities. For instance, in *Citizen and Inhabitants of Municipal Ward No 17 Municipal Corporation Gwalior*, the Municipal Corporation of Gwalior was directed to 'construct...sewer lines...construct public latrines and urinals at suitable sites so as not to cause any nuisance to the citizens'.¹⁵⁸ In *Citizens Action Committee, Nagpur*, the High Court of Bombay directed the government to clean the sewerage and directed the government '...to draw up a scheme not only to canalise the entire *Nala*, but to cover it either at one stretch or in phases so as to protect the public health, as may be feasible'.¹⁵⁹ In *Koolwal*, the High Court of Rajasthan, in addition to directing the local body to clean the city, fixed a deadline of six months was fixed for the municipality to comply with the direction.¹⁶⁰ Further, the Court appointed five advocates as Commissioners to submit a report on the implementation of the sanitation specific duties by the Municipality under the Rajasthan Municipality Act 1959.

The setting up of the National Green Tribunal (NGT) in 2011 has opened up a new opportunity for environmental litigations including litigations on sanitation-related issues. The NGT has become the central forum for environmental matters.

¹⁵⁸ *Citizen and Inhabitants of Municipal Ward No 17 Municipal Corporation Gwalior v The Municipal Corporation, Gwalior* MP No 461 of 1984 (I), Order of 16 December 1991 (MANU/MP/0468/1991) (High Court of Madhya Pradesh).

¹⁵⁹ *Citizens Action Committee, Nagpur v Civil Surgeon, Mayo (General) Hospital, Nagpur and Others* AIR 1986 Bom 136 (High Court of Bombay).

¹⁶⁰ *LK Koolwal v State of Rajasthan* AIR 1988 Raj 2 (High Court of Rajasthan).

Since the setting up of the NGT, the Supreme Court of India and high courts have been transferring environment-related cases to the NGT. This includes cases pertaining to the right to sanitation.¹⁶¹ The subject-matters of litigation in this context include environmental pollution due to open defecation,¹⁶² discharge of untreated wastewater,¹⁶³ and environmental pollution due to municipal solid waste.¹⁶⁴ People and movements have also approached the NGT to challenge the decision of the government to set up landfills, for instance the decision of ULBs to set up landfills in rural and peri-urban areas.¹⁶⁵

Legal forums including the courts provide an opportunity for the right-holders to make the duty-bearers accountable. In principle, the forums discussed above are available for individuals and organisations to compel the duty-bearers to work towards the realisation of their right to sanitation. However, it is unclear as to how many people can use these forums to get their rights enforced. The fact that there are very few cases in the rural sanitation context probably hints to the fact that the poor and the vulnerable hardly use the legal forums for enforcing their legal rights including the right to sanitation. It is also doubtful if a factory worker or a construction worker will assert her right to sanitation and fight against her employers legally to get the sanitation facilities as prescribed in the concerned statutory framework. This may require a vigilant government mechanism to ensure implementation of various statutes. This is particularly essential where right holders may be reluctant or unable to fight the legal battle or assert their rights due to various reasons including the lack of awareness, poverty and existing power relations based on factors such as caste, class and gender.

¹⁶¹ eg *Almitra Patel v Union of India* Original Application No 199 of 2014, Judgment of 22 December 2016 (NGT—Principal Bench); *Jith Kumar v State of Kerala*, Application No 442/2013 (pending) (NGT—Southern Zone Bench).

¹⁶² *M Kumaravel v The Collector, Kancheepuram District* Application No 273 of 2013, Judgment of 10 October 2015 (NGT—Southern Zone Bench).

¹⁶³ *Subhash C Pandey v Municipal Corporation Bhopal and Others* Original Application No 34 of 2013, Judgment of 19 September 2014 (NGT—Central Zone Bench).

¹⁶⁴ *Almitra Patel* (n 161); *G Vijaya Kumar v. Secretary to Government* Application No 117 of 2014, Judgment of 15 October 2015 (NGT—Southern Zone Bench).

¹⁶⁵ *Vilappilsala Samyuktha Samara Samithi v State of Kerala* Application No 247 of 2014, Judgment of 30 September 2015 (NGT—Southern Zone Bench).

Approaching the judicial forums may help the right-holders to claim their rights. However, it may not always lead to the upholding of the rights. Judicial interventions may sometimes end up violating the rights of the poor and the marginalised, for instance as happened in certain cases where the right to environment of urban middle class led to the eviction of the urban poor from their so-called illegal settlements.¹⁶⁶ In some cases, the judiciary's interventions led to the denial of livelihood opportunities for farmers and fishing communities because the water they were using was polluted due to the discharge of untreated or partially treated wastewater.¹⁶⁷ The potential danger of leaving the poor to pay the price of inactions or inadequate actions of government agencies is a serious concern in the context of judicial interventions to realise rights including the right to sanitation.

IV. FRAMEWORK FOR IMPLEMENTATION: FRAGMENTATION, LAW-POLICY DIVIDE AND LACK OF ACCOUNTABILITY

The legal system in India recognises the right to sanitation both explicitly and implicitly. It may be difficult to find the term 'right to sanitation' explicitly used in the statutory framework. Yet the manner in which sanitation-related duties have been articulated in statutes and interpreted by the higher judiciary in India indicates the legal recognition of the right. However, there is no comprehensive statutory framework to govern the realisation of the right. Thus, the realisation of the right is dependent on a complex web of statutes and policy instruments with varying nature and scope.

The existing statutory framework, by and large, uses the language of duties such as the duties of the panchayat, pollution control boards and employers. This can be considered as an articulation of the right to sanitation through the language of duties. The statutes use mandatory language to make it a non-negotiable legal duty. As far as basic sanitation is concerned, statutory provisions can be read as

¹⁶⁶ *Almitra Patel v Union of India* (2000) 3 SCC 575 (Supreme Court of India).

¹⁶⁷ eg *Manoj Misra v Union of India* Original Application No 6 of 2012, Judgment of 13 January 2015 (NGT—Principal Bench).

recognising the right to access to separate toilets at public places, schools and workplaces. Some statutes further elaborate the right with provisions on availability of water and light, adequacy in terms of number of toilets and the duty to maintain the cleanliness as well as suitability of toilet facilities to people with disability. Environmental laws further expand the scope of the right to include the quality of the environment as an important facet of the right to sanitation. The law prohibiting manual scavenging adds the important caste and dignity dimensions of sanitation as part of the framework for the right to sanitation. Nevertheless, the real challenge is to what extent these laws empower the right-holders to demand their rights and react against the violation of their rights.

The existing statutory framework does not provide an integrated conceptual framework. Instead, various statutes address different dimensions of sanitation such as toilets, waste management and manual scavenging. As a result, different dimensions of the right to sanitation are expected to be realised through different statutes. The diffused nature of the statutory framework probably prevented various statutory agencies from viewing sanitation in a broad perspective. Put differently, it led to a scenario of several institutional players acting under different statutes with little or no coordination between them. Thus, a comprehensive approach towards the right to sanitation has been, by and large, missing in the statutory framework.

The fragmented statutory framework has led to the domination of the policy framework in the sanitation sector in India. The policy framework has been governing the sector for the last couple of decades. Thus, the policy framework occupied the regulatory space and implementing agencies understood the policy framework as *the* framework for operational purposes. There are mainly two reasons for this situation. First, the policy framework has been the major source of fund for state governments to implement sanitation interventions and therefore implementing agencies followed the norms and guidelines provided under it rather than the relevant statutes. Second, the policy framework has established sanitation specific institutional mechanisms at different levels of administration and as a result, it began to be identified with the word ‘sanitation’ whereas it was

not the case as far as the statutory framework was concerned due to its fragmented nature.

The policy framework for sanitation is not a unified one either. The framework is separate for rural and urban sanitation both in terms of norms and institutions. The adoption of the SBM led to further diversification of school and anganwadi sanitation. Taken together, the policy framework follows a comprehensive approach to sanitation. It follows a broad conceptual understanding that includes multiple dimensions of sanitation including the elimination of open defecation, safe management of solid and liquid waste, and MHM. Thus, in principle, the policy framework addresses all important elements of the right to sanitation in the Indian context. An important concern in this regard is how, and to what extent, such a comprehensive concept is getting implemented. This question is addressed in the following chapters.

The domination of the policy framework has implications for the right to sanitation. First, policies are not subjected to any democratic process and the executive could change it at any time. In fact, the policy framework has undergone changes several times in the past without any deliberation among the people or the elected representative of the people. Second, one of the important advantages of defining sanitation in human rights terms is its prospect to ensure accountability of the duty-bearers. The programmatic approach followed by the policy framework has been systematically avoiding the accountability question. Third, the policy framework is not guided by any statutory framework that recognises the right to sanitation and remedies in case of violation of the right to sanitation. On the contrary, the policy framework views people as ‘beneficiaries’ and not as right-holders. As a result, the question of remedies does not arise. Put it differently, the ‘beneficiaries’ are expected to negotiate their claims politically and there is no scope for claiming it as a right. From a legal perspective, the non-justiciable nature of the policy framework makes it inappropriate to be the key framework to regulate the implementation of a fundamental right.

Despite the silence of the policy framework on accountability and remedies, individuals and organisations have invoked provisions in statutes and the

Constitution of India to claim various aspects of the right to sanitation. The Supreme Court of India, high courts and the NGT have adjudicated a number of cases that involve elements of the right to sanitation. It indicates the opportunity provided under the Constitution of India and different statutes to individuals to enforce their right. It also indicates the possibility of using the legal provisions to compel the State to fulfil sanitation-related duties such as the duty to provide waste management facilities and toilets at public places. The evolving concept of right to sanitation can also be used to compel local bodies to provide sanitation facilities including toilets to the so-called ‘unauthorised settlements’ and ‘slums’ because lack of land tenure or property right cannot be a factor that hinders the realisation of the fundamental rights enshrined in the Constitution of India.

While the higher judiciary and the NGT are indeed options available for individuals and groups to promote the realisation of the right to sanitation, relying solely on litigation at these forums to realise rights is not prudent either. The social, economic and geographic factors may constrain the ability of the right-holders to approach these forums. Therefore, the availability of these judicial forums cannot rule out the need for a statutory framework that compels the agencies implementing various sanitation interventions to take seriously all the elements of the right to sanitation including access to remedies.

SUMMARY

The right to sanitation has been recognised in India at different levels. From the constitutional perspective, sanitation has been recognised as a fundamental right. The higher judiciary has interpreted the fundamental right to life to include the right to sanitation. However, it has not provided any concrete guidance as to the contents of the right. This is understandable given the limitations of the judiciary to elaborate the right in the light of facts and circumstances in a given litigation. Such an elaboration is ideally to be provided through a statutory framework. Unfortunately, the existing statutory framework related to sanitation also do not provide a clear conceptual framework of the right to sanitation. The existing statutory framework applicable to sanitation interventions is either inadequate as

is the case of laws governing local self-governments or context specific as is the case with statutes discussed above.

The sanitation sector in India has seen a peculiar trend where the absence of laws or ambiguous laws has led to the domination of the policy framework insofar as regulation and governance are concerned. It also appears that the Union Government and state governments prefer to regulate and govern the sanitation sector through policies and administrative directions. As a result, the policy framework is generally silent on the right to sanitation and implementation agencies hardly follow a rights-based approach while implementing sanitation interventions.

IMPLEMENTING THE RIGHT IN RURAL AREAS: THE TOILET FOCUS AND BEYOND

The rural sanitation scenario in India is far from adequate. While 12.6 per cent of households in urban areas do not have access to any kind of toilet, the same figure for rural areas is 69.3 per cent.¹ A recent report by the Government of India estimates that 45.3 per cent of the households in rural areas have sanitary toilets, which shows an improvement since Census 2011.² According to the Secretary, Ministry of Drinking Water and Sanitation:

Overall, progress is good, with rural sanitation coverage having gone up from 39 per cent to 67 per cent in three years and over 230 million people in rural India have stopped defecating in open. Five states, 186 Districts and over 2,31,000 villages have been declared as ODF.³

Studies on rural sanitation statistics, however, show that the absolute number of households in rural India that do not have access to a toilet within their premises has gone up during the last inter-census period (2001–2011).⁴ However, the statistics indicates only the existence of infrastructure, not the use of infrastructure or its contribution to the realisation of the right to sanitation. Even in places where toilets exist, it may not always ensure public health and environmental quality either due to the non-use of toilets or due to the unscientific construction of toilets.

¹ Government of India, Census of India 2011—Availability and Type of Latrine Facility <http://censusindia.gov.in/2011census/hlo/Data_sheet/India/Latrine.pdf>. For a discussion on various data on rural sanitation, see A Kumar, ‘Discrepancies in Sanitation Statistics of Rural India’ (2015) 50(2) Economic and Political Weekly 13 and A Singh and N George, ‘Revisiting Discrepancies in Sanitation Statistics of Rural India’ (2015) 50(26) Economic and Political Weekly 96.

² Government of India, Swachhta Status Report 2016 (Government of India 2016).

³ P Iyer, ‘More than Toilets’ *The Indian Express* (Delhi 22 August 2017) 14.

⁴ Kumar (n 1).

For example, improperly constructed toilets may cause groundwater pollution and this is already a crisis in some rural areas.⁵

Open defecation and poor sanitation scenario may affect women, children and other vulnerable groups disproportionately. For instance, open defecation has been highlighted as an important reason for child stunting and malnutrition in India.⁶ Similarly, studies have highlighted that women face a number of health, safety and dignity related issues including physical and sexual violence due to inadequate or lack of sanitation facilities.⁷

Manual scavenging is another important issue in the rural sanitation context. Dry latrines and the practice of manual scavenging ought to have been completely eliminated long time ago, but they still continue to pose challenges for the realisation of the right to sanitation in rural areas.⁸ The rate of manual scavenging (0.3 per cent of the total households) is same for rural and urban areas.⁹ However, the absolute number in rural areas would be much higher than in urban areas because the number of households in rural areas is more than 200 per cent of the households in urban areas.¹⁰ The practice of manual scavenging further exposes the link between sanitation and the caste system in India because invariably people belonging to lower castes particularly dalits (predominantly women) carry out manual scavenging.

⁵ PU Megha et al, 'Sanitation Mapping of Groundwater Contamination in a Rural Village of India' (2015) 6 Journal of Environmental Protection 34.

⁶ D Spears et al, 'Open Defecation and Childhood Stunting in India: An Ecological Analysis of New Data from 112 Districts' (2013) <<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0073784>>; R Chambers and GV Medeazza, 'Sanitation and Stunting in India Undernutrition's Blind Spot' (2013) 48(25) Economic and Political Weekly 15.

⁷ See S Lennon, 'Fear and Anger: Perceptions of Risks Related to Sexual Violence Against Women Linked to Water and Sanitation in Delhi, India' (SHARE Briefing Note 2011); UN-HABITAT and Mahila Chetna Manch, 'Navigating Gender in Development of Water and Sanitation in Urban Areas—A Rapid Gender Assessment of the Cities of Bhopal, Gwalior, Indore and Jabalpur in Madhya Pradesh, India' (UN HABITAT 2006).

⁸ According to Census 2011, there are still around 26 lakh insanitary latrines in India and around 70 percent of them are in rural areas. See Census of India 2011—Availability and Type of Latrine Facility (n 1).

⁹ *ibid.*

¹⁰ *ibid.*

The policy framework has been predominantly regulating sanitation interventions in rural areas at least since the adoption of the CRSP in 1986. Agencies implementing sanitation interventions in rural areas have almost exclusively followed the norms laid down under the policy framework. Thus, the policy framework is the most important framework relevant from an implementation point of view. Therefore, this chapter focuses on the implementation of the policy framework to assess the realisation of the right to sanitation in rural areas.

The first section analyses the focus of the policy framework on toilets and its implications for other aspects of rural sanitation such as the gender, environmental, caste and labour dimensions. It also examines to what extent the implementation of sanitation interventions in rural areas has contributed to the realisation of the right to sanitation from the perspective of the poor and the marginalised. The second section examines the strategies and approaches of the policy framework from a right to sanitation perspective. This section analyses to what extent the policy framework follow a rights-based approach to sanitation. The gender, environmental, caste and labour dimensions are discussed in detail in Part II and III and therefore this chapter only briefly outlines these issues.

I. THE RACE TO BUILD TOILETS: EXPOSING A REDUCTIONIST UNDERSTANDING OF THE RIGHT TO SANITATION

Access to toilet is an important facet of the right to sanitation. At the same time, it is only one among several equally important dimensions of the right to sanitation. However, in the last couple of decades, sanitation interventions in rural areas have overwhelmingly focused on toilets (more specifically household toilets). The focus on toilets has led to the low prioritisation of other key aspects of the right to sanitation, most importantly the environmental, caste and gender dimensions. Further, the focus on individual household latrines (IHHLs) has resulted in the neglect of basic sanitation facilities in other places, most importantly in public places, schools and anganwadi centres. Further, the IHHL focus has followed an infrastructure-based approach without considering the realisation of the right to sanitation for everyone. Thus, sanitation needs and concerns of some of the

vulnerable and marginalised groups, such as people with disability and the elderly people, have been ignored. Overall, this approach has resulted in a very narrow understanding of sanitation with little effect for the realisation of the right to sanitation.

**A. THE EXCLUSION OF THE POOR AND THE MARGINALISED
FROM THE TOILET MAP**

The focus of sanitation interventions on household toilets is problematic from two angles. First, the focus on ‘households’ systematically excludes the homeless and the people living in dwellings that are not technically considered as houses, for instance labour camps or the so-called unauthorised dwellings on government land. Second, sanitation interventions treat the category ‘household’ as a single entity; it overlooks the fact that people within a household could have different sanitation requirements.¹¹

The universal design promoted by the erstwhile and the ongoing sanitation interventions do not take into account the sanitation requirements of certain vulnerable groups of people such as people with disability or the elderly. For example, according to Censuses 2011, the state of Uttar Pradesh houses the highest number of people with disability (4,157,514), and a majority of them (3,166,615) live in rural areas. Even though the state of Uttar Pradesh has recently started implementing sanitation interventions, facilities suitable for people with disabilities were found generally non-existent in rural areas. Sanitation interventions are, in fact, an opportunity for the government to fulfil its legal duty of ensuring barrier-free access for the people with disability.¹² However, implementing agencies are yet to understand the need for linking the policy framework for rural sanitation and the relevant statutory framework, for instance the duties prescribed under the law on the rights of the people with disability.¹³

¹¹ WSSCC and FANSA, *Leave No One Behind: Voices of Women, Adolescent Girls, Elderly and Disabled People, and Sanitation Workers* (WSSCC and FANSA 2016).

¹² Rights of Persons with Disabilities Act 2016, s 40; Rights of Persons with Disabilities Rules 2017, r 15.

¹³ *ibid.*

Migrant labourers constitute another vulnerable group from a rural sanitation point of view. While migration is a serious issue in urban areas, it is also relevant in the rural context particularly in a state such as Kerala where the urban-rural divide is not so significant in terms of employment opportunities. Migrant labourers are generally provided common accommodation covered with tin or plastic sheets with limited facilities. On the sanitation front, on an average 3–5 toilets are available for 80–120 individuals.¹⁴ It is also likely that their dwellings are not included in the list of ‘households’ to be served by the rural sanitation programmes. For instance, a Block Development Officer in Kannur District of Kerala admitted that migrant workers do not have adequate sanitation facilities. Yet the effort of the government has been to enhance their awareness of the advantages of sanitation rather than providing the needed facilities through sanitation interventions. This reflects the insensitivity of the government to the rights of the migrant labourers. It also highlights the lack of interest in enforcing the relevant laws that protect the rights, including the right to sanitation, of workers in general and migrant workers in particular.¹⁵

People belonging to Scheduled Castes (SCs) and Scheduled Tribes (STs) are the other sections of the society that are generally missing in the toilet map. Sanitation facilities in areas predominantly inhabited by SCs are very poor. For instance, in the Churu district of Rajasthan, some members of the SC communities stated that they did not receive any benefit of the rural sanitation programme. Similarly, some people belonging to SC communities in the Chitrakoot district of Uttar Pradesh stated that they are even unaware of the financial assistance provided by the government to build toilets.

A comparatively progressive state such as Kerala in terms of its achievements in toilet coverage is not an exception when it comes to treating the people belonging to SCs and STs differentially. For instance, basic sanitation facilities for the

¹⁴ D Narayana and CS Venkiteswaran, *Domestic Migrant Labour in Kerala* (Gulati Institute of Finance and Taxation and Government of Kerala 2013).

¹⁵ *eg* Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979, s 16(d).

people of SCs and STs in the state are very poor.¹⁶ Local level implementing agencies in the Wayanad district of Kerala cited the resistance of the tribal people to construct and use toilets as a major reason for the lack of basic sanitation facilities in tribal areas. They also cited language as a barrier for implementing agencies in engaging with the tribal population. Implementing agencies have also cited similar reasons to explain the lack of basic sanitation facilities in coastal areas in Kerala. While the habit of people and the language barrier may be serious challenges, these cannot be an excuse for the failure to take any initiatives. In fact, these challenges indicate the need for a greater attention to the communities belonging to SCs and STs.

The race to achieve the ODF status focuses only on the existence of at least one toilet in a house and it does not probe whether the existing toilets are accessible to everyone. Sanitation needs of the poor and the marginalised people are hardly taken into consideration. The exclusion of sanitation needs of the poor and the marginalised people means that the existing framework for sanitation interventions is not based on the right to sanitation. Further, the declaration of any village, district or the whole state as ODF does not make much sense from the perspective of the poor and the marginalised people as long as they are excluded from the rural sanitation map. The exclusion of the poor and the marginalised groups of the society may be justifiable from a mission's point of view because it allows the achievement of targets in a phased manner. But it cannot be justified from a human rights point of view because human rights law requires special attention to be paid on a priority basis to the needs of the most under-privileged. These concerns have not yet struck policy makers or implementing agencies.

B. THE IHHL FOCUS AND THE DOWNPLAYING OF PUBLIC TOILETS

Sanitation interventions in rural areas regard toilet at the individual household level as the foremost priority. Access to sanitation in public places such as

¹⁶ Source: personal interview with Prof (Dr) Gangadharan, Kannur University, Kerala and fieldwork conducted in Wayanad district, a district in Kerala where tribal population is significant (18.5 per cent of the total population).

markets and bus stands has been an issue of low priority. The SBM-Gramin Guidelines explicitly provide that community sanitary complexes can be considered in cases where IHHLs are not possible. Similarly, public toilets have been suggested for public places such as bus stands and markets.¹⁷ However, at the implementation level, community sanitary complexes and public toilets are understood as steps that are supposed to be taken up after completing IHHLs. Lack of concern for public toilets is further clear from the fact that public toilets do not exist or function even in panchayats that are declared ODF and have received the NGP.

In rural areas in Rajasthan and Uttar Pradesh, implementing agencies are yet to start focusing on public toilets. Currently, implementing agencies are focusing on IHHLs. In Kerala, the whole state has been declared as ODF, but basic sanitation facilities in public places are still non-existent in a majority of the places visited during the fieldwork. Wherever they exist, for instance in some villages in Kerala, most of them are non-functional or locked. Implementing agencies, during interview, cited reasons such as lack of resources and facilities such as electricity and water for not being able to provide and/or maintain basic sanitation facilities in public places.

The neglect of basic sanitation facilities in public places demonstrates the narrow approach of sanitation interventions. Open defecation and urination while people are away from their homes are considered acceptable even in villages that are known as *nirmal grams*. It is ironical that implementing agencies are working towards declaring their areas ODF while not seeming to be bothered about basic sanitation facilities in public places. It seems irrational for the rural sanitation framework to encourage people to use toilets at home on the one hand and fail to provide sanitation facilities in public places where a large number of people gather for different purposes such as work, shopping, cultural events and religious festivals on the other hand.

¹⁷ Swachh Bharat Mission (Gramin) Guidelines 2014, para 5.8.

Further, the existing community sanitary complexes and public toilets predominantly follow the 'pay and use' model. For example, in Kerala, the few existing public toilets are functioning as 'pay and use' facilities. There is a view, particularly at the international level, that human rights law does not envisage a particular economic model for the realisation of the rights.¹⁸ This view seems to be a first step towards justifying the idea of full cost recovery and ultimately the complete withdrawal of the State from its responsibility vis-à-vis the realisation of rights. This approach does not seem to be in conformity with the right to sanitation as understood in the context of the Constitution of India. Further, many a time, it is taken for granted that people have the capacity and willingness to pay. The fact that people are paying does not necessarily mean that they have the capacity to pay or that they are willing to pay. In many places people explicitly stated that they are paying because of the lack of alternatives.¹⁹ This situation may make access to sanitation more expensive for the poor and the homeless because they are likely to use public facilities more often than others. Further, such a system reflects a market-oriented approach and not an approach based on fundamental rights.

This is not to say that pricing is absolutely unacceptable in cases of all kinds of sanitation related services. Instead, the point is market-oriented approach must not be the primary strategy through which the right to sanitation is expected to be realised. The right to sanitation demands an approach that views the right as a universal right where any sort of social and economic factors shall not impede anyone's ability to realise her right to sanitation. Pricing or market-oriented approach may stay as a subsidiary approach that too only if it does not restrict the scope or objective of the rights-based approach.

¹⁸ C de Albuquerque and IT Winkler, 'Neither Friend nor Foe: Why the Commercialization of Water and Sanitation Services is not the Main Issue in the Realization of Human Rights' (2010-2011) 17 *Brown Journal of World Affairs* 167; S Murthy, 'The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over Privatization' (2013) 31 *Berkeley Journal of International Law* 89.

¹⁹ See also D Rajaraman et al, 'A Qualitative Study of Access to Sanitation Amongst Low-Income Working Women in Bangalore, India' (2011) 1(1) *Journal of Water, Sanitation and Hygiene for Development* 432.

Sanitation being a fundamental right, its partial fulfilment by having toilets at home and not having such facilities at public places is untenable from a right to sanitation point of view. Sanitation interventions need to internalise the fact that human beings move to different places for various purposes possibly on a daily basis and their right to sanitation must be respected in all places, not just at homes.

C. SCHOOL SANITATION: THE NEED TO FOCUS ON TOILETS AND BEYOND

School sanitation was an important part of the policy framework for rural sanitation until the adoption of the SBM in 2014. The SBM-Gramin brought a change and transferred the responsibility of sanitation in schools and anganwadi centres to the Ministry of Human Resource Development and the Ministry of Women and Child Development respectively.²⁰ Nevertheless, the State continues to be fully responsible for school and anganwadi sanitation. While toilets are generally constructed under the *Sarva Shiksha Abhiyan*,²¹ state governments provide annual fund to schools to cover expenses for water, sanitation and hygiene consumables such as soap for hand washing, cleaning agents and engaging the cleaners.

This can be seen as a reflection of a duty-oriented approach to the right to sanitation. It can also be seen as an initiative to fulfil the duties of the State deriving from article 21-A of the Constitution of India, the Right of Children to Free and Compulsory Education Act 2009, and the directions of the Supreme Court of India.²² This interpretation is possible because the *Swachh Bharat Swachh Vidyalaya*—A National Mission (Clean India Clean Schools) document

²⁰ Swachh Bharat Mission (Gramin) Guidelines 2014, para 3.3.

²¹ Sarva Siksha Abhiyan is a flagship programme of the Union Government on universal elementary education.

²² *Environment and Consumer Protection Foundation v Delhi Administration* (2011) 7 SCC 57 (Supreme Court of India).

explicitly recognises these legal instruments and highlights the legal obligations deriving from them.²³

Overall, the sanitation scenario in schools appears to have improved significantly. Government statistics reveal that 83.78 per cent of the total schools in the country have separate toilets for girls and 94.04 per cent of the total schools in the country have separate toilets for boys.²⁴ This is impressive when compared to the achievements in the context of household toilets and public toilets.

However, fieldwork conducted in three states reveals a different scenario. Though toilets exist in several schools in rural Rajasthan and Uttar Pradesh, they are unusable. Representatives of local bodies and school staff cited lack of money for maintenance and lack of water supply as the key reasons for not being able to maintain the toilets in schools. In places where toilets are in a usable condition, several of them remain locked and therefore inaccessible to students. During fieldwork in Chakpurvi village in Pratapgarh district in Uttar Pradesh, three toilets were found in a school of which two were in a pathetic condition and one was found locked. Teachers and staff in the school explained that they lock it because students do not clean it after use. However, according to some students, those toilets in good condition are meant for the exclusive use of the teachers and other staff members. In addition to that, inadequacy of sanitation facilities is also a concern. Even though there are clear norms that require the details of the facilities to be made available in all schools, none of them seem to have followed it. Inadequacy of toilets is an issue even in Kerala where functioning toilets generally exist in schools. In all the three states, other sanitation issues such as waste management and MHM in schools are yet to be attended to.

There seems to be a significant contrast between the official statistics and the actual situation. It also reveals that sometimes the numbers and figures are

²³ Swachh Bharat Swachh Vidyalaya—A National Mission (Ministry of Human Resources Development 2014) 7.

²⁴ National University of Educational Planning and Administration, 'Elementary Education in India: Rural India—Where Do We Stand?', Analytical Report 2013-2014 <http://dise.in/Downloads/Publications/Documents/Rural_2013-14.pdf, 79-80>.

misleading as it only signifies the existence of infrastructure and not the sanitation outcome or the realisation of the right to sanitation. The gap between the school sanitation norms and the actual situation proves that the presence of norms does not guarantee the realisation of the right to sanitation. The realisation of the right to sanitation requires positive actions from the government such as continuous investment in infrastructure and regular funding for their maintenance.

D. UNDERMINING OF ENVIRONMENT, CASTE AND GENDER DIMENSIONS

The primary focus of sanitation interventions on IHHL has led to the undermining of other key aspects of the right to sanitation, most importantly gender, environmental and caste dimensions. This in effect led to adverse implications for the environment and violation of the rights of dalits and women. All the three aspects mentioned here are relevant in both the rural and the urban sanitation contexts and discussed separately in Part II and III. Therefore, this section focuses on providing a brief introduction to these issues in the rural sanitation context from an implementation perspective.

First, sanitation interventions have neglected the environmental dimensions of the right to sanitation. There has been little or no focus on issues pertaining to sanitation which have serious environmental implications, for instance waste management. It is a common practice in almost all villages visited during the fieldwork in Rajasthan and Uttar Pradesh to let the wastewater flow to a nearby pond. Thus, it appears that water pollution due to insanitation has not yet attracted the attention of implementing agencies at the local level. Further, the rush to achieve the ODF status has led implementing agencies to ignore the environmental implications of IHHLs that are being built as part of sanitation interventions. The failure or the reluctance of implementing agencies in Rajasthan to prevent people from digging deep unlined pits for latrines shows the neglect of environmental implications of improperly built toilets. In Kerala, the use of deep unlined pits in the last couple of decades has already caused groundwater

pollution.²⁵ Several persons in Kerala, during interview, admitted that toilets in their houses are connected to deep unlined pits. The neglect of environmental implications of both insanitation and sanitation interventions may have severe implications for public health particularly for infants because children under five years old are the major victims of sanitation related diseases.²⁶

Second, although the link between caste and sanitation is obvious and it is more predominant in rural areas, sanitation interventions have neglected the issue. For instance, in Uttar Pradesh, it was found that sanitation interventions in rural areas have not paid adequate attention to the issue of manual scavenging. Although the State houses an overwhelming majority of manual scavenger in India ²⁷ , implementing agencies were not concerned about taking initiatives to identify and demolish dry latrines and to ensure that sanitation facilities that take care of human rights and environmental concerns are available in such places.

Another visible manifestation of this could be seen in the case of sanitation work such as sweeping. For instance, local bodies in Rajasthan still employ dalits to clean villages. Panchayat officials and people generally in certain districts admitted that sometimes dalits are brought from faraway places to clean their villages. In Uttar Pradesh, there is a permanent government post of a sanitation worker in each panchayat. People from all castes have joined due to the attractive salary and other benefits of a government job. However, in practice, the people of higher castes who have been appointed to the post do not undertake the work themselves; instead they employ dalits to do the job by paying them a paltry sum.²⁸ Thus, the dominant perception and practice is that the sanitation work is to be carried out by dalits. It also shows the lack of a right consciousness at the implementation level because the caste-based allocation of jobs such as sanitation

²⁵ Megha et al (n 5).

²⁶ Rural Sanitation and Hygiene Strategy 2012–2022 (2011) 9.

²⁷ S Ediga, 'Manual scavenging in India: 86% of All the Manual Scavengers in the Country are in Uttar Pradesh', 10 May 2015 <<https://factly.in/manual-scavenging-in-india-8-pc-manual-scavengers-are-in-uttar-pradesh/>>; Government of India, Ministry of Social Justice & Empowerment, Rajya Sabha, Unstarred Question No. 1402 <<http://164.100.47.234/question/annex/239/Au1402.pdf>>.

²⁸ See also T Tripathi, 'Safai Karmi Scheme of Uttar Pradesh: Caste Dominance Continues' (2012) 47(37) Economic and Political Weekly 26.

work is against the constitutional prohibition of untouchability²⁹ and the concept of the right to sanitation as understood in the context of the Constitution of India.

Third, the undermining of sanitation needs and concerns of women is another important issue. Women have specific sanitation needs such as the needs related to MHM. They are arguably prone to several sanitation-related vulnerabilities, for instance gender-based violence while accessing sanitation facilities or in the context of open defecation. Both these issues are discussed in detail in chapter 5. However, sanitation interventions and their implementation have not addressed the specific challenges faced by women. For instance, the issue of MHM is yet to find a place in the agenda of implementing agencies in the states of Rajasthan and Uttar Pradesh although it has progressively received the policy makers' attention.³⁰

While the sanitation needs of women have not received adequate attention, the framework for rural sanitation has invoked the 'dignity' and 'prestige' of women to promote the construction of toilets. Thus, implementing agencies in Rajasthan and Uttar Pradesh have used gender stereotype messages addressed to men to invoke their male prestige and honour to build toilets to protect the dignity of women. Such practices tend to objectify women and therefore violates the principle of gender equality—an issue that needs more detailed analysis and which is done in chapter 5.

II. THE FOCUS ON 'DEMAND' AND 'INCENTIVES': SIDELINING OF RIGHTS AND SUSTAINABILITY

A major focus of sanitation interventions in rural areas is to employ different methods to create the 'demand' so that the 'targets or goals' can be achieved

²⁹ See Constitution of India 1950, art 17. See also Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013.

³⁰ Menstrual Hygiene Management—National Guidelines 2015 <www.mdws.gov.in/sites/default/files/Menstrual%20Hygiene%20Management%20-%20Guidelines_0.pdf>. See also Scheme for Management of Menstrual Hygiene among Adolescent Girls in Rural India, Ministry of Health and Family Welfare, DO No M/12015/103/2010-MCH (4 Mach 2016).

within a prescribed time frame. Such an approach with its rush to achieve targets has also led implementing agencies to adopt strategies of shaming, intimidation and force. This has severe implications for rights including the right to sanitation and sustainability.

A. TRIGGERING, DEMAND GENERATION AND MOVING AWAY FROM RIGHTS

Since the adoption of the Total Sanitation Campaign in 1999, sanitation interventions have been following a demand-oriented approach.³¹ This marks a paradigm shift from the erstwhile approach to rural sanitation, which was a supply-oriented approach with a focus on providing subsidy to individual households to build toilets. This was probably based on the understanding that people do not build and use toilets because they are not affordable for them. Put it in another way, the government undertook the duty of making toilets available in every rural household.

A shift from this approach was introduced in the late 1990s when the policy framework adopted the demand-oriented approach, which is premised on the understanding that people are willing to take initiatives and invest in toilets provided they are made aware of the advantages of using a toilet or safe sanitation and hygiene practices generally. Thus, since the late 1990s, sanitation interventions have focused on motivating people to adopt safe sanitation and hygiene practices such as use of toilets and hand washing—generally known as ‘triggering’ among implementing agencies at the local level. The idea was to make people aware of the health and environmental benefits of sanitation, most importantly the need for eliminating open defecation. This focus continues. As a result, great emphasis has been laid on a component called ‘advocacy and communication’.³² Up to eight per cent of the total budget has been thus earmarked for ‘advocacy and communication’ under the SBM-Gramin.³³

³¹ Total Sanitation Campaign Guidelines (modified) 2011.

³² Swachh Bharat Mission (Gramin) Guidelines 2014, para 5.2.

³³ *ibid* para 4.

It appears that implementing agencies at the local level have blindly internalised the policy shift. Officials of implementing agencies at the local level in all the three states underlined the ignorance of the people as the key problem for the government to address. While implementing agencies in rural Rajasthan and rural Uttar Pradesh emphasised the ‘ignorance’ of the rural population in general, implementing agencies in Kerala referred to the ‘ignorance’ of certain groups of the population mainly the tribals and the people living in coastal areas.

The premise of ‘ignorance’ of the people led sanitation interventions to focus on awareness-creation programmes and to provide incentives to individual households to build toilets. Both these aspects have effectively eclipsed or prevented the emergence of an approach based on the right to sanitation. The term ‘incentive’ itself marks a significant shift compared to the term ‘subsidy’ used by the supply-oriented intervention programmes. It indicates the shifting of the key responsibility from the government to individuals and households. This is in sharp contrast with one of the basic principles of human rights that entrusts the primary responsibility of its realisation with the State.³⁴

The awareness-creation programme per se is not problematic. Increasing awareness amongst people about the health and environmental benefits of sanitation is essential. For instance, providing sanitation lessons to school students so that they understand the importance of sanitation from an early age is a sound strategy. However, this cannot be the key strategy. This ought to be only one of the several initiatives towards the ultimate objective of the realisation of the right to sanitation. Further, the ongoing awareness-creation programmes focus exclusively on individuals to promote the use and construction of toilets. It does not seem to consider the need for training of implementing agencies to imbibe a rights-based approach to sanitation.

It appears that international development agencies such as the WSSCC and the WSP too have not taken initiatives to integrate the language of rights in

³⁴ See UN Human Rights Council Resolution—The Human Right to Safe Drinking Water and Sanitation, UN Doc A/HRC/RES/18/1 (12 October 2011) para 5.

awareness-creation programmes while undertaking training programmes for government officials and NGOs. A number of district level officials in Rajasthan involved in the implementation of rural sanitation programmes acknowledged the involvement of the WSP as a key player in providing training to implementing agencies in the State. The influence of the WSP is such that implementing agencies in different districts in Rajasthan found to have been using similar narratives and strategies to ‘trigger’ people which probably indicates the same source of information for all of them. An influential international agency such as the WSP could have easily used their training programmes to imbibe a rights-based approach among implementing agencies, which apparently it did not do.

The strategy of providing financial incentives is fundamentally an economic approach and not an approach based on human rights. This is probably the reason why sanitation interventions do not recognise the entitlements of the people. It has also led the government to perceive its involvement in a substantive way as counter-productive. For instance, it was a common response by implementing agencies that people will not use sanitation facilities if the government builds them and that people will use sanitation facilities only if they ‘own’ them. This approach appears to push the policy framework for rural sanitation away from the language of rights and duties.

Thus, the focus on demand generation and incentives has left little space for the language of rights and duties. At the same time, the government and the people have different perceptions of sanitation. Although the people have not yet started claiming sanitation as a right, this does not necessarily mean that they consider sanitation to be solely a private responsibility—a notion that is promoted by the policy framework and some commentators and being implemented by the government.³⁵ For instance, at least some people from rural Rajasthan and rural Uttar Pradesh, during interview, explicitly stated that sanitation is primarily a responsibility of the government. Several government officials at the state level and at the local level too confirmed that people perceive sanitation as a

³⁵ eg I Winkler, ‘The Human Right to Sanitation’ (2016) 37(4) *University of Pennsylvania Journal of International Law* 1331.

responsibility of the government. Thus, this perception points to the understanding of sanitation as a right at least in an indirect way and it seems to be similar to the manner in which people have started claiming other rights, for instance water and health.³⁶ The perception of the people also fits well with the understanding of the right to sanitation in the context of the Constitution of India because fundamental rights in the Constitution of India are universal rights with the primary responsibility on the State to ensure its realisation for everyone.

At the same time, the emphasis on the primary responsibility of the State does not mean to undermine the role of individuals and communities. In fact, individuals and communities have a very important role in the process of realisation of the right to sanitation. For instance, behavioural changes and cultural acceptance by community as a whole are two factors, among others, that are extremely necessary to make the realisation of the right to sanitation a reality. In this regard, it is not state versus community or individuals. In fact, human rights support a co-operative framework where the State assumes the primary responsibility and it is also the duty of the State to involve individuals and communities as right-holders.

This is conceptually different from certain commentators' argument that the role of the state in realisation of the right to sanitation is that of a facilitator and direct provisioning of service is an 'exception to the general rule'.³⁷ This is also different from the argument that human rights do not require a specific model of service provisioning and therefore privatisation or a market-oriented model of achieving sanitation goals can co-exist with the idea of right to sanitation.³⁸ It appears that both these arguments follow a neo-liberal conception of human rights and do not seem to reflect the realities and everyday experiences of the people in the

³⁶ Recent examples where right-holders have claimed the rights to health and water are: *Mohd. Ahmed v Union of India* Writ Petition (Civil) No 7279 of 2013, Judgment of 17 April 2014 (High Court of Delhi) (right to health); *Pani Haq Samiti v Municipal Corporation of Greater Mumbai* Public Interest Litigation No 10 of 2012, Interim Order of 15 December 2014 (High Court of Bombay) (right to water).

³⁷ eg Winkler (n 35) 1387.

³⁸ eg Albuquerque and Winkler (18).

developing world where an active involvement of the State including in the provisioning of basic services including sanitation services is essential.³⁹

B. INCENTIVISING INFRASTRUCTURE BUILDING, NOT THE REALISATION OF THE RIGHT

The strategy of financial incentives has so far focused on building household toilets. It reflects the policy framework's understanding of the responsibilities of individuals and the government. The strategy of incentives focuses on household toilets which reveal that the policy framework for rural sanitation understands household toilets as a responsibility of individual households. At the same time, other elements of the right to sanitation, such as public toilets, MHM and waste management are regarded as the responsibility of the government. This probably indicates the trend of a gradual reduction of the responsibilities of the government and shifting the burden to individuals or the private sector.

Lack of focus on sustainability is another major critique of the strategy of incentives. The incentive mechanism mainly focuses on the construction of toilets, not on their use or their contribution to the realisation of the right to sanitation. This is exemplified by the fact that a number of toilets constructed as part of erstwhile rural sanitation programmes are not in use or being used for other purposes.⁴⁰ This is corroborated by fieldwork in Rajasthan and Uttar Pradesh where a large number of toilets were found unusable or unused. There is very little or no focus on ensuring the sustainability concerns such as the continued use of toilets.

This indicates the limited or lack of impact of the incentive mechanism on actual use of toilets and therefore on the realisation of the right to sanitation. Implementing agencies at the local level also complained about inadequate money

³⁹ For a discussion on neo-liberalisation of human rights, see P O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 Modern Law Review 532; J Wills, 'The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony' (2014) 27(1) Leiden Journal of International Law 11.

⁴⁰ D Coffey et al, 'Revealed Preference for Open Defecation: Evidence from a New Survey in Rural North India' (2014) 49(38) Economic and Political Weekly 43.

being available for monitoring the sustainability of the sanitation infrastructure. For instance, a block level officer in the Pratapgarh district of Uttar Pradesh stated that the government rules permit only rupees 50 as bicycle allowance, a standard determined in the 1950s. A few block level officials in Churu district in Rajasthan confirmed that a motivator gets rupees 75 for getting a household toilet constructed. The amount seems too low to monitor effectively the sustainability of toilets or sanitation infrastructure in general within the jurisdiction of a panchayat.

The experience of the NGP further illustrates the issue of lack of focus on sustainability. The NGP was introduced as a mechanism of collective incentive to rural local bodies that achieve ODF status.⁴¹ The idea was to appreciate rural local bodies that achieved this status and to encourage other rural local bodies to achieve the same. The focus of the NGP was also on the construction of toilets—mainly household toilets. This is clear from the fact that the practice of open defecation continues in many villages that received the NGP. In rural Rajasthan, several toilets are being used for other purposes, for instance to store dried cow dung and firewood. In one NGP village in the Ernakulam district of Kerala, a few houses use hanging toilets, which consists of just a structure to squat with the human excreta being directly disposed into a canal. Studies conducted in other states have also revealed similar trends.⁴² The failure of the NGP system to ensure sustainability was probably one of the reasons for its withdrawal in 2015.⁴³ The new guidelines on the verification of ODF status now focus on the sustainability element as well.⁴⁴

The way incentives work reveals that economic instruments have serious limitations in ensuring the realisation of the right. From a right to sanitation perspective, the incentive mechanism may help, provided it works within a

⁴¹ Nirmal Gram Puraskar Guidelines 2012.

⁴² eg A Hueso and B Bell, 'An Untold Story of Policy Failure: the Total Sanitation Campaign in India' (2013) 15 *Water Policy* 1001; D Sanan, 'The CLTS Story in India: The Sanitation Story of the Millennium' in L Mehta and S Movik eds, *Shit Matters: The Potential of Community-Led Total Sanitation* (Practical Action Publishing 2011) 87.

⁴³ Ministry of Drinking Water and Sanitation, Discontinuation of Nirmal Gram Puraskar (NGP) Scheme, Doc No S-11011/7/2015-SBM (6 November 2015).

⁴⁴ Ministry of Drinking Water and Sanitation, Open Defecation Free (ODF) Sustainability Guidelines, Notification No S11011/3/2015-SBM (Pt.1) (15 December 2016).

framework that views the right to sanitation as a universal entitlement and conceptualises incentives as one of the ways in which the government fulfils its obligations towards the realisation of the right.

C. INTIMIDATION AND SHAMING: NEITHER RESPECTING RIGHTS NOR FOLLOWING THE DEMAND-ORIENTED APPROACH

Awareness-creation is not the only way through which the policy framework for rural sanitation seeks to promote the construction of individual household toilets. Implementing agencies at the local level use the strategy of intimidation and shaming as well.

Implementing agencies frequently use the strategy of intimidation to force people to construct toilets. While these strategies are not formally recognised in the policy framework, fieldwork revealed different ways in which they manifest in practice. In some cases, local bodies impose fine on individuals who defecate in the open. In rural Rajasthan, the fine in this regard ranges from rupees 50 to 500. However, the implementing agencies admitted during interview that the strategy of imposing fine is primarily employed as a tool to force people and it is not meant to be implemented strictly.

Blocking or denying the entitlements of the public distribution system or rural employment schemes is another instrument of intimidation. For instance, a Gram Panchayat President in Tonk district in Rajasthan expressed the ‘use’ of such strategies to ‘force’ people to build toilets so that the Panchayat can be declared ODF. In some other cases, local bodies adopt the strategy of blocking or delaying of salaries of employees of panchayats until they build toilets at their houses. An anganwadi teacher in Tonk district of Rajasthan admitted that she has been warned that her salary will be withheld until she builds a toilet at her house. Experiences from other states also show that the intimidation strategy, in some cases, reportedly went to the extent of threatening people with arrest and imprisonment if they defecated in the open or if they failed to construct toilet at

their homes.⁴⁵ The strategy of intimidation also includes reminding women of the risks of sexual violence while openly defecating. For instance, a block level officer who was in charge of implementing rural sanitation programmes in Pratapgarh district in Uttar Pradesh admitted that he and his colleagues show women cuttings from newspapers that report sexual harassment or rape of women when they went out for open defecation.⁴⁶

It is also not uncommon that local bodies put pressure on people for personal and political reasons. Some politicians at the Gram Panchayat level, for instance in Tonk district in Rajasthan, wanted their village to be declared ODF while they were in power to take the personal and political credit of it. These examples show that implementing agencies are willing to employ any strategy to achieve sanitation goals regardless of its implications for rights.

Shaming is another common strategy adopted by implementing agencies at the local level. *Nigrani* committees (monitoring committees) at the local level use the shaming strategy to prevent people from open defecation. Members of *nigrani* committees in various places generally roam around the village early in the morning to prevent people from going to the field. Another common strategy is to blow whistles when they spot any incident of open defecation. In a recent incident, implementing agencies in the Pratapgarh district of Rajasthan allegedly took photographs of people including women defecating in open, which led to altercation between officials of implementing agencies and the local people and eventually the death of a person.⁴⁷ The strategies of intimidation and shaming target women specifically or affect them disproportionately. This issue is discussed in chapter 5 in detail and therefore not covered here.

⁴⁵ A Chauhan, 'Jail Term for People Caught Defecating in Open' *The Times of India* (8 April 2016) <<http://timesofindia.indiatimes.com/city/agra/Jail-term-for-people-caught-defecating-in-open/articleshow/51748088.cms>>. See also S Sengupta et al, 'Mission Madness' *Down to Earth* (16-31 July 2017) 31.

⁴⁶ For similar critique of the implementation of sanitation programmes in Madhya Pradesh, see M Poornima, 'No Maryada for women in MP Government's Sanitation Drive', *Hindustan Times* (24 December 2013) <www.hindustantimes.com/india/no-maryada-for-women-in-mp-govt-s-sanitation-drive/story-SExzZ6YDuy6kzM1bhpwfN.html>.

⁴⁷ H Khan, 'Man Dies After Fight with Officials Taking Photos of Women Defecating in Open' *The Indian Express* (Jaipur 17 June 2017) 1.

The strategy of shaming and intimidation is not limited to individuals but also extends to institutions. For instance, implementing agencies at the lower level are pressurised by the institutions above them. The implementing agencies at the district level in rural Rajasthan admitted that they are being pressurised by the state level and the national level agencies. The district level agencies in turn transfer the pressure to the village level officials. The pressure in this context is to achieve the ODF status as early as possible. There were also instances, for instance in Bikaner district in Rajasthan, where village level officials were asked to sit on different sides in the meetings called for by the District Collector on the basis of sanitation achievements in their villages. According to some village panchayat presidents, they have accelerated the construction of toilets in their jurisdiction to get rid of the shame of differential seating arrangement. This explains why some of the local bodies are even ready to go to the extent of denying entitlements under the public distribution system or rural employment schemes and salaries to force people to construct toilets.

Toilets have assumed significant political relevance since the adoption of the SBM. A novel, but strange, way in which some states have promoted the construction of toilet is by making it a pre-condition to contest in elections to the local bodies. A few states have amended the state laws governing local bodies to include this condition.⁴⁸ This needs to be seen in the broader context of state governments using laws governing local bodies to achieve different social goals. For instance, the government of Rajasthan recently included a minimum educational qualification as a requirement to contest in elections to a local body.⁴⁹ Similarly, sanitation programmes are also being used to promote other policy objectives. For instance, the Union Government has recently issued a notification to make Aadhaar⁵⁰ mandatory to receive incentives under the SBM-Gramin.⁵¹ The

⁴⁸ eg Rajasthan Panchayati Raj (Amendment) Act 2015 (s 19-q); Bihar Panchayati Raj (Amendment) Act 2015 (s 136-k).

⁴⁹ Rajasthan Panchayati Raj Act 1994 (s 19-r to t) (as amended by Rajasthan Panchayati Raj (Amendment) Act 2015).

⁵⁰ Aadhaar is a unique identification number that contains demographic and biometric information of the concerned individual. For details, see Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016.

idea of making one programme or one policy outcome a pre-condition for availing benefits under another programme is problematic because it, by definition, amounts to forcing people and depriving them of their agency. The realisation of any human right ought not to be achieved by forcing people or by curtailing or threatening to curtail their entitlements.

The strategies of intimidation and shaming highlight the fact that these strategies adversely affect the marginalised people and could become a form of social control.⁵² They also expose the weakness of the demand-oriented approach that is built upon the premise that people are generally willing and they just need to be ‘triggered’. It appears that this premise does not capture the reality well. The failure of the demand-oriented approach at the local level is probably the reason why implementing agencies are adopting the strategies of intimidation and shaming, including the exertion of pressure and denial of entitlements, to achieve sanitation goals. Further, the strategies of intimidation and shaming are fundamentally incompatible with the idea of human rights. Thus, there is a need for the policy framework to imbibe the rights consciousness. Policy makers need to understand that the realisation of one right must not lead to the violation of another right or a group of rights.

It is pertinent to understand the rationale behind adopting the strategies of intimidation and shaming. It appears that implementing agencies at the local employ these strategies for practical reasons. For instance, one of the District Collectors in Rajasthan explicitly stated that the officials in her district underscore the dignity and prestige of women and use women specific narratives because these strategies work well in a state where patriarchy is a prevailing norm. She further mentioned that these strategies help sanitation agencies to achieve the goal—ie ODF status to the district—quickly. Thus, practical convenience prevails over constitutional rights and being politically correct.

⁵¹ Ministry of Drinking Water and Sanitation, Doc No S-12013/3/2015/-SBM-Part (1) (20 March 2017).

⁵² L Mehta, ‘Introduction: Why Shit Matters: Community-led Total Sanitation and the Sanitation Challenge for the 21st Century’ in L Mehta and S Movik eds, *Shit Matters: The Potential of Community-Led Total Sanitation* (Practical Action Publishing 2011) 11.

An important question in this regard is how a large number of districts in Rajasthan and probably in other states too have got convinced and internalised these strategies. There could be two explanations for this scenario. First, it is probable that implementing agencies at the district-level are following the policy guidance framed at the state-level. For instance, the state-level policy framework on rural sanitation in the state of Madhya Pradesh begins with a pledge by men to uphold the dignity of his sister, daughter, wife and mother.⁵³ This reflects the official endorsement for implementing agencies to use patriarchy to achieve sanitation goals. Second, the training being given to implementing agencies by external agencies could be a relevant factor. For instance, the WSP has trained implementing agencies at least in a few districts in Rajasthan. It also played a crucial role in training implementing agencies in the state of Himachal Pradesh.⁵⁴ It is plausible that implementing agencies are employing these strategies as they have been trained.

D. PEOPLE AS ‘TARGETS’, NOT AS ‘RIGHT-HOLDERS’ AND ‘PARTICIPANTS’

The focus on demand generation and incentives treats people as ‘targets’ to be triggered and in some cases to be forced. This is a top-down model that presumes the ignorance of the people and therefore it does not provide any active space for the people. The role of the people in a framework based on human rights is that of a ‘rights-holder’ with agency.⁵⁵ A right-holder is entitled to participate in the process towards the realisation of the right. The participation in this regard could be through the elected representatives of the people or through democratic forums such as the *Gram Sabha*.⁵⁶ Participation of right-holders at both these levels are generally missing insofar as implementation of sanitation interventions in rural areas is concerned. Sanitation interventions are being implemented with little or

⁵³ Maryada Abhiyan Guideline 2013.

⁵⁴ Sanan (n 42).

⁵⁵ E Filmer-Wilson, ‘The Human Rights-Based Approach to Development: the Right to Water’, (2005) 23 Netherlands Quarterly of Human Rights 213, 218.

⁵⁶ A *Gram Sabha* is a body consisting of all persons eligible to cast their vote in a village. There could be a *Gram Sabha* for a village or for more than one village. For a legal definition, see Uttar Pradesh Panchayat Raj Act 1947, s 2(g).

no respect for the procedural aspects of the right to sanitation, most importantly the right to participation.

The institution of *Gram Sabha* is, in principle, an opportunity for the people to participate in the process of governance including in the decision-making process in the context of implementation of sanitation interventions. Government officials in Rajasthan claimed, during the interviews, that village-level meetings happen frequently where every aspect of various developmental programmes including rural sanitation programmes are discussed. However, villagers stated that such meetings are hardly held and in most cases the *pradhan* (the president of a village panchayat) decides everything related to the implementation of all programmes including sanitation programmes. In reality, caste, gender and class factors appear to determine the power relations and implementation of various initiatives including sanitation interventions.

The lack of participation by right-holders has also led to consequences such as patronage, lack of transparency and corruption. The issue of corruption is evident when some villagers in Kushi Nagar district in Uttar Pradesh explicitly stated that the *pradhan* had asked for money to construct toilets. Some people also complained that the toilets were not constructed even after they had paid their *pradhans* the money demanded from them, which differed from rupees 500 to 2500 from place to place. It is also not uncommon that the benefits of various programmes including sanitation interventions go to areas where influential people live. A number of people, for instance in Pratapgarh district in Uttar Pradesh, raised the issue of sanitation workers who are appointed to clean the villages working only in *pradhan's* area or at the *pradhan's* home.

The lack of opportunity to participate may also affect the poor and the marginalised disproportionately. For instance, women are generally not consulted while taking decisions both at the panchayat level and at the household level. A woman from Pratapgrah district in Uttar Pradesh explicitly underlined this issue of exclusion. The exclusion of women has reportedly led to decisions that do not take into consideration their needs and concerns. Thus, the location of toilets is generally decided by men or the panchayat officials or the contractors appointed

by the *pradhan* without taking into consideration whether it is convenient for women to access the toilet at times because women may not prefer a toilet at the front of their homes, a place generally occupied by men.⁵⁷ Similarly concerns and needs of the poor and the people belonging to lower castes may also be undermined because they too are generally not represented in the decision-making process. This is confirmed from the fieldwork in Rajasthan and Uttar Pradesh where many dalit families were even unaware of the policy framework and the financial assistance they are entitled to.

Rights essentially involve choices of the right-holders. Any policy framework related to a right must respect the elements of choice and agency of the right-holders. A right must not be imposed on the right-holders as the policy framework for rural sanitation currently does. The patronage system and the unquestionable power exercised, for instance, by *pradhans* highlight the need for educating implementing agencies about various rights relevant to their duties. Further, the policy framework, by following a programmatic approach instead of a rights-based approach, makes patronage and exclusion possible at the local level. Therefore, the lack of a consciousness of rights is pervasive and needs to be addressed at the level of policy making and implementation.

III. SANITATION INTERVENTIONS IN RURAL AREAS: REALISING THE RIGHT OR COUNTING TOILETS?

Sanitation interventions in rural areas have been implemented at least since the mid-1980s. Nevertheless, the rural sanitation scenario in India continues to be inadequate. While access to toilets has been improved to some extent, other elements of the right to sanitation are yet to be addressed. A close scrutiny of the implementation of sanitation interventions in rural areas reveals a number of issues that have not yet been reflected in the broad statistics and reports published

⁵⁷ See also K O'Reilly, 'Combining Sanitation and Women's Participation in Water Supply: An Example from Rajasthan' (2010) 20(1) *Development in Practice* 45.

by various government and non-governmental agencies. There are five key issues emerging from the discussion above in this chapter.

First, an examination of the manner in which sanitation interventions have been implemented in rural areas reveals that there is a huge gap between conceptualisation and implementation. The policy framework defines sanitation in a broad manner to include important elements of the right to sanitation such as health, environment, gender and caste. However, implementing agencies follow a narrow conception of sanitation that focuses almost exclusively on toilets. This is problematic mainly because implementing agencies understand toilets as their primary focus and other issues such as waste disposal and MHM are treated as secondary sanitation issues that are to be addressed after the elimination of open defecation. Thus, sanitation interventions are being implemented in a phased manner with elimination of open defecation as the objective of the first phase. This is also problematic because the focus on toilet is not complete. The ongoing focus and a major part of the investment are on toilets at the household level. This approach has led to the undermining of basic sanitation facilities in public places. Further, the ongoing approach related to household toilets is myopic to the sanitation needs of the poor and the marginalised groups such as the people with disability, homeless, and women, and it overwhelmingly focuses on the construction of toilets with little attention being paid to the issue of sustained use of toilets.

Access to toilet is indeed an important aspect of the right to sanitation. However, this does not mean that sanitation interventions can stop at ensuring access to sanitation infrastructures. The right to sanitation needs to be understood beyond access to toilets. The realisation of the right to sanitation requires equal importance to be given to public health and environmental outcomes as well as the concerns related to privacy and dignity while exercising basic bodily functions. The ongoing sanitation interventions, by limiting its focus to toilets, thus hardly contribute to the realisation of the right to sanitation as they do not ensure the right to everyone and they do not deal with all important aspects of the right. As a

result, the right to sanitation is realised partially for some privileged classes and denied completely for several under-privileged classes.

Second, an assessment of the implementation of sanitation interventions in rural areas reveals that the duty-bearers have followed a programmatic approach; not a rights-based approach. As a result, sanitation interventions have overwhelmingly focused on ‘targets’ and ‘goals’. By and large, implementing agencies in the three states where fieldwork was conducted have used the word ‘beneficiaries’ to refer to the people. The word ‘right’ was almost completely absent in their general understanding. One of the implications of the absence of the language of rights is that the poor and the marginalised groups do not get priority while implementing sanitation interventions. The implementing agencies believe that sanitation is primarily a responsibility of individuals and the role of the government is merely to trigger or motivate the people. The approach is not different even in a state such as Kerala where the policy document has explicitly recognised sanitation as right.⁵⁸ Thus, the right to sanitation as recognised by higher judiciary has not yet influenced the implementation of sanitation interventions in rural areas.

While implementing agencies view sanitation as a mission, the approach and the perception of the right-holders are slightly different. Although the right-holders have not yet started using the term ‘right to sanitation’ explicitly, some of the interviews conducted during the fieldwork have revealed the fact that the people do not consider it solely as a private responsibility either. At least some of the interviewees explicitly stated that sanitation is a responsibility of the government. Some of the representatives of the implementing agencies in Rajasthan and Uttar Pradesh too confirmed that people generally think that sanitation is a responsibility of the government. However, the perceptions of both the right-holders and the duty-bearers are not informed by the legal recognition of the right to sanitation. Therefore, it is essential that the perception of both the right-holders and the duty-bearers be based on the right to sanitation as interpreted to be part of the fundamental right to life so that the differential understandings can be

⁵⁸ See Malinya Mukta Keralam—Action Plan (November 2007) 5.

minimised. The lack of knowledge about the right to sanitation also indicates the need for including dissemination of information on the right to sanitation a part of the ongoing awareness-creation programmes. It is also very important that such programmes focus on the duty-bearers as well.

Third, the process or the approach towards the implementation of sanitation interventions in rural areas poses challenges for the right to sanitation as well as other rights. The implementation of sanitation interventions has been in a mission mode in the last couple of decades. Thus, sanitation was perceived as a goal measured primarily in terms of toilet coverage. In the late 1990s, the policy framework for rural sanitation underwent a drastic transformation by shifting to the demand-oriented approach from the erstwhile supply-oriented approach. One of the essential features of this transformation was the change in the role of the government. While the government used to assume affirmative roles in the supply-oriented regime, the role of the government has been reduced significantly in the demand-oriented regime. The new demand-oriented framework views at least basic sanitation as fundamentally being a responsibility of the individual and the role of the government as that of a motivator. Thus, the ongoing demand oriented approach is not based on a rights-based approach.

Fourth, the mission mode and the rush to show the results have led to the flow of pressure from the top to bottom to make villages ODF as soon as possible. The pressure has manifested in different ways in different places. In some cases, the pressure from the top led to the adoption of different intimidating strategies including the threat of denial of other entitlements such as the supply of food through the public distribution system and payments under the ongoing rural employment schemes. Sometimes implementing agencies use patriarchal norms to achieve sanitation goals because such strategies are perceived to be effective in bringing results in the sanitation sector. These violations of rights are not considered to be violations as they are justified on basis of their effectiveness in achieving sanitation results. Thus, sanitation interventions in rural areas disrespect not just the right to sanitation, but also other constitutional rights and principles such as the right to gender equality.

Fifth, the strategies of demand generation and incentives followed by the policy framework for rural sanitation treat the right-holders as a target; consequently, there is no mechanism to ensure the participation of right-holders at the implementation level. The lack of opportunity to participate arguably affects the poor and the marginalised disproportionately. Thus, the concerns and needs of certain sections such as women and dalits have not received adequate attention at the implementation level. This is unjustifiable from a right to sanitation point of view because the right to sanitation requires special attention to be paid to the needs and concerns of the under-privileged on a priority basis. Instances such as the patronage of *pradhans* as seen in many places expose the fact that power shaped by caste, class and gender rather than constitutional rights and principles determine the implementation of sanitation interventions.

The discussion in this chapter indicates the need for fundamental changes in the norms and strategies of the policy framework for rural sanitation. The current approach that relies completely on policy instruments to regulate sanitation interventions is problematic, as it does not take into consideration the fact that sanitation has been recognised as part of the fundamental right to life. This needs to be changed to make the right to sanitation as developed in the context of fundamental rights in the Constitution of India the key determining factor and a guiding principle for implementing sanitation interventions. The implementation of sanitation interventions ought to be regulated through a statutory framework at the state-level that is based on the expanded concept of the right to sanitation and that ensures accountability and access to remedies. Sanitation interventions must, thus, focus on the realisation of the right and must not limit its focus on building sanitation-related infrastructures.

SUMMARY

The rural sanitation sector in India shows a peculiar trend where laws have been stagnant and inadequate. At the same time, the policy framework has undergone significant transformation from time to time. This has led to a situation where the policy framework occupies the dominant position compared to the statutory framework from an implementation point of view. It appears that the government

prefers to address rural sanitation issues through policies and programmes as opposed to addressing it through a statutory framework that emphasises on the right to sanitation. It has led to addressing sanitation issues in a programmatic way as opposed to viewing it as a matter of realising a fundamental right. Further, the domination of the policy framework has led to drastic changes in the governance of rural sanitation without any discussion among people's representatives at different levels and it has left a huge gap from a participation point of view.

An analysis of the implementation of sanitation interventions in rural areas reveals a number of trends and approaches that are far short of realising the right to sanitation from the point of view of public health, environment, women, the poor and the marginalised. This situation, therefore, requires the adoption of a comprehensive understanding of sanitation as a matter of right and its implementation through a statutory framework. Policies and programmes are welcome steps as long as they work within the boundaries determined by the Constitution of India and statutes.

PART-II

GENDER AND ENVIRONMENTAL DIMENSIONS

SANITATION AND WOMEN: VULNERABILITIES, NEEDS AND IMPLICATIONS FOR RIGHTS

Women have specific sanitation needs and they are arguably prone to several sanitation-related vulnerabilities such as gender-based violence while accessing sanitation facilities and difficulties in managing hygiene during menstruation. Sanitation specific needs and vulnerabilities of women are partly due to biological reasons and partly due to social and cultural factors. The realisation of the right to sanitation of women, therefore, is dependent on how the legal and policy framework for sanitation addresses various factors underlying these specific sanitation needs and vulnerabilities.

The first section of this chapter describes the specific sanitation-related needs and vulnerabilities of women and examines to what extent these needs and vulnerabilities have been recognised or addressed by the legal and policy framework for sanitation. The second section analyses the implementation of sanitation interventions from a gender perspective. It examines to what extent the recognition of sanitation-related needs and vulnerabilities of women at the law and policy level has been translated into actions at the local level. The third section recaptures the major arguments discussed in the chapter.

I. SANITATION FROM A GENDER PERSPECTIVE

Lack of sanitation or inadequate sanitation poses several risks to human beings. For instance, polluted environment takes a serious toll on public health. Similarly, open defecation poses safety related risks such as gender-based violence, snake

bites and animal attacks in addition to health risks.¹ However, all individuals are not equally prone to these risks or vulnerabilities. Caste, class and gender make some people more vulnerable to these risks than others. Gender is one such category immensely relevant in the sanitation context because women face several unique vulnerabilities and risks that are linked to lack of sanitation or inadequate sanitation.

A gender-based approach to the right to sanitation is essential to understand the issues faced by women as well as to analyse the responses by the legal and policy framework. Over the years, the law and policy framework has progressively recognised the sanitation-related needs and vulnerabilities of women. In this context, this section describes and reviews sanitation-related needs and vulnerabilities of women. This part also reviews to what extent the existing legal and policy framework for sanitation in India has addressed gender-related concerns and issues.

A. SANITATION NEEDS AND VULNERABILITIES OF WOMEN

1) Open defecation: physical and cultural burden for women

The absence of sanitation facilities poses several challenges for women in India.² Women generally do not want to be seen while going for or doing defecation or urination due to social and cultural reasons. As a result, women, especially girls and young women, do not prefer to go to the field for open defecation during the day. The general response received during the fieldwork in Rajasthan and Uttar Pradesh points to the fact that women generally go for open defecation early in the morning or at night, that too in groups. In order to avoid going to the field for

¹ See C Wendland et al, 'Gender Aspects of Sustainable Sanitation Based on Experiences and Literature Research' (2009) <http://huussi.net/tapahtumat/DT2009/pdf/Claudia_Wendland.pdf>; S Darapuri, 'Bill Gates: From Toilets to Dignified and Healthy Living' (2012) <www.countercurrents.org/darapuri120712.htm>.

² See generally UN HABITAT, Navigating Gender: in Development of Water and Sanitation in Urban Areas—A Rapid Gender Assessment of the Cities of Bhopal, Gwalior, Indore and Jabalpur in Madhya Pradesh, India (UN HABITAT 2006); T Khanna and M Das, 'Why Gender Matters in the Solution towards Safe Sanitation? Reflections from Rural India' (2015) 11(10) Global Public Health 1.

open defecation during the day, they undertake coping strategies such as the reduction of the intake of food (especially fibrous foods such as pulses or leafy vegetables) and liquids.³ An unbalanced diet may also result in negative long-term consequences, including various disorders of the bowel, such as constipation, piles, serious inflammation and irritable bowel syndrome.⁴ It is also not uncommon that women ‘hold out’ till it gets dark which may cause health problems such as urinary tract infections, chronic constipation and other gastric disorders.⁵ The special sanitation needs of women during menstruation, pregnancy and postnatal recovery are also overlooked where toilets are not available and open defecation is the only option.⁶

Lack of, or inadequate, sanitation facilities seems to pose safety related concerns for women. Some of these concerns, for example snake bites, chasing by stray dogs, collapsing of community toilet as happened in Mumbai,⁷ are not necessarily gender specific. However, the prevailing cultural norms make women more vulnerable to these risks than men as women are likely to use a toilet more often than men or women are more likely to go to secluded places (eg in the bushes) to defecate and urinate.

At the same time, the narrative that women generally go for open defecation under the cover of darkness cannot be generalised beyond a point. For instance, at least some women from rural Rajasthan and rural Uttar Pradesh stated during the fieldwork that they do not follow the ‘before sunrise, after sunset’ timing. According to them, it is very difficult to hold when they have the urge and

³ M Bapat and I Agarwal, ‘Our Needs, Our Priorities; Women and Men from the Slums in Mumbai and Pune Talk about Their Needs for Water and Sanitation’ (2003) 15 *Environment and Urbanization* 71.

⁴ Tearfund, ‘Gender and Sanitation: Breaking Taboos, Improving Lives’ (2008) <http://tilz.tearfund.org/webdocs/Tilz/Topics/C9113_SanGender_WEB.pdf>.

⁵ S Burra et al, ‘Community-designed, Built and Managed Toilet Blocks in Indian Cities’ (2003) 15(2) *Environment and Urbanization* 11; G Pardeshi, ‘Women in Total Sanitation Campaign: A Case Study from Yavatmal District, Maharashtra, India’ (2009) 25(2) *Journal of Human Ecology* 79.

⁶ Z Burt et al, *Towards Gender Equality through Sanitation Access* (UN Women, Discussion Paper 2016) 5.

⁷ S Koppikar, ‘Death-trap Toilets: the Hidden Dangers of Mumbai's Poorest Slums’ *The Guardian* (27 February 2017) <www.theguardian.com/global-development-professionals-network/2017/feb/27/death-trap-toilets-mumbai-india-slums>.

therefore, they do not wait. This is probably because finding a secluded place for open defecation is not a big challenge in certain places because of the availability of land in these areas. At the same time, a few women living at the centre of villages stated that it is very difficult for them to walk long distance to find places for open defecation and therefore they prefer to have a toilet at accessible distance.

It also appears that the element fear as has been generally highlighted in the literature could also not be generalised.⁸ During the interview with the womenfolk, some of them refuted this fear element. For instance, some women in Sagrampur village in Pratapgarh district of Uttar Pradesh stated that they do not like to go to a toilet all the time and find it easier to go to the forest or field. They explicitly underlined that they are no more or no less afraid of going to the forest or field for defecation than men. They also stated that they find it easier to go to field with a small mug of water rather than going to a toilet with a bucket full of water. This issue is even more serious in places where water availability is an issue. For instance, an activist working with Vanangana in Chitrakoot district of Uttar Pradesh stated that there is immense pressure from the government to build and use toilets, but there is no adequate focus on how this is practical when there is not enough water. She also stated that such a scenario will end up increasing women's workload as they are responsible for fetching water.

The opportunity women get to socialise has also been mentioned as a reason for the preference for open defecation among women, at least in some cases, even when a functioning toilet is available at home. Other studies have also highlighted this aspect.⁹ This does not mean that open defecation should be promoted as it serves a social goal for women. It illustrates how women are otherwise restricted or controlled socially and how they use open defecation as an opportunity to overcome, at least partly, those restrictions or control.

⁸ eg S Lennon, 'Fear and Anger: Perceptions of Risks Related to Sexual Violence Against Women Linked to Water and Sanitation in Delhi, India' (SHARE Briefing Note 2011); WSSCC and SHARE, 'Sanitation Vulnerabilities, 'Women's Stresses and Struggles for Violence Free Sanitation' (WSSCC and SHARE, Research Briefing Note 2015).

⁹ eg N Singh, 'Translating Human Right to Water and Sanitation into Reality: A Practical Framework for Analysis' (2013) 15 Water Policy 943, 954.

Open defecation also poses other kinds of inconveniences and risks. For instance, the practice of standing (and hiding) repeatedly while defecating because of passing people or vehicles may cause health problems.¹⁰ This is particularly a problem in urban areas and peri-urban areas where open land is very limited or fast shrinking. Women are also more vulnerable to accidents (such as falling into a drain or being hit by a vehicle) or animal attacks and insect bites (snakes, scorpions etc).¹¹ These risks do not arise for men, at least in the same intensity as women face, because culture does not impose serious disciplinary norms on men. For instance, it is culturally ‘acceptable’ for men to be seen walking to a field for defecation and it is even more ‘acceptable’ to be seen urinating in public.

In urban areas, open defecation is not a major problem for people living in planned areas where household toilets and drainage facilities are available. However, these facilities are not available to everyone, especially to those living in urban slums and some of the resettlement colonies.¹² As a result, open defecation is prevalent except in areas where community toilet complexes or public toilets exist. However, even these toilet facilities often fail to address the sanitation needs and concerns of women. They are inadequate or unsafe (and in some cases unusable) on a host of grounds such as the high density of population, lack of sewerage, water and/or electricity connections, inconvenient opening and closing hours, lack of facilities such as dustbins for disposing menstrual waste and broken doors/roofs and the absence of latches on doors.¹³ Consequently, the practice of open defecation continues unabated and arguably poses considerable personal risks for women and girls. The closing of community toilet complexes at night affects some women more adversely than others. Some studies note that the

¹⁰ Pardeshi (n 5) 83.

¹¹ *ibid* 83.

¹² K Travers et al eds, *Gender and Essential Services in Low-income Communities: Report on the Findings of the Action Research Project Women’s Rights and Access to Water and Sanitation in Asian Cities* (Women in Cities International 2011); Lokniti and CSDS, ‘Slums, States and Citizens: Policing, Welfare Services and Political Participation Among Urban Poor in Delhi’ (Lokniti and CSDS 2012).

¹³ S Sheikh, *Public Toilets in Delhi: An Emphasis on the Facilities for Women in Slum/Resettlement Areas* (Centre for Civil Society, CCS Working Paper No 92 2008); P Khosla and S Dhar, ‘Safe Access to Basic Infrastructure—More than Pipes and Taps’ in C Whitzman et al (eds), *Building Inclusive Cities: Women’s Safety and the Right to the Cities* (Routledge 2013) 117.

closure of community toilet complexes at night forces newly married woman to defecate in plastic bags as they are subjected to more restrictions than other women.¹⁴

2) Women's special sanitation needs: silenced by culture

Sanitation needs are gendered and women have specific sanitation needs different from men mainly due to two reasons. First, women's bodies are biologically different. For example, MHM and pregnancy related needs are women specific and not experienced by men. Second, social and cultural norms impose a lot of burden on women, which make it difficult for them to manage or address their sanitation needs.¹⁵ For instance, social and cultural norms make the act of urination and defecation more private to women when compared to men.

Thus, access to a toilet is more important for women and girls when compared to men. This is so both in private spaces like home and in public places. In this regard, the pay and use system mostly prevalent in urban areas pose special difficulties especially for working women as they, unlike men, need to use it both for urination and defecation. Given the fact that the wage level of women is comparatively low, this system is either an economic burden to women or a health burden as they reduce the consumption of water to avoid going to a public toilet.

A women who sells vegetables near a bus stand in Panamaram panchayat in Wayanad district of Kerala highlighted the fact that she uses the nearby pay-and-use public toilet. She also underlined that sometimes she does not pay if she does not have enough money and the caretaker of the toilet generally does not create any problem—a fact subsequently confirmed by the caretaker during interview. This points to the fact that women has to negotiate for exercising her right to sanitation due to economic constraints and it generally depend upon a lot on the 'generosity' of the caretaker of the toilet concerned. Men may not face such an issue as it is culturally acceptable for them to urinate in open.

¹⁴ KC Sahoo et al, 'Sanitation-related Psychosocial Stress: A Grounded Theory Study of Women Across the Life-course in Odisha, India' (2015) 139 Social Science and Medicine 80, 86.

¹⁵ Burt et al (n 6).

Absence of facilities to ensure MHM at public toilets aggravates women's sanitation experiences and sufferings.¹⁶ The lack of attention to these issues and concerns reflects a law and policy framework for sanitation that is gender myopic and antithetical to the idea of gender equality. This is not to suggest that gender equality is to be ensured by creating a social and cultural situation wherein women could also indulge in open urination and defecation as men, but to underline the need for the law and policy framework to take into consideration the social and cultural constraints faced by women in the context of sanitation.

MHM is another important sanitation related concern for women. This is a concern partly due to the cultural notion that equates or explains menstruation with a lot of negativity and disgust such as 'dirty', 'smelly', 'unhygienic' and 'unclean'.¹⁷ Women and girls are expected to (rather told or taught) to deal with it silently and discreetly. This is, for instance, clear when a school teacher in rural Uttar Pradesh stated that even though dust bins are provided at the school, girl students do not use it to discard the used absorbents due to the fear of being noticed by boys. Lack of adequate facilities at schools may force girl students not to change the absorbents at school.¹⁸ In most cases, women in rural areas use (and re-use) cloth as absorbents.¹⁹ Cleaning and drying of cloths or disposal of pads is a source of indignity, fear and stress. In order to avoid other people noticing it, they usually wash and dry the used cloths inside the house. Lack of water supply at home sometimes forces women and girls to walk to a pond to wash or walk to a field to bury/burn the used absorbents.²⁰ In addition to the inconvenience, the unhygienic management of menstruation may cause a number of health risks, for instance the risk of reproductive tract infection.²¹ This may happen, for instance,

¹⁶ *ibid* 14.

¹⁷ Vatsalya, *Women with Wings: Celebrating Womanhood—Menstrual Hygiene Management Path to Better Health, Dignity, Opportunities and Empowerment* (Vatsalya 2014) 5.

¹⁸ WSSCC and FANSA, 'Leave No One Behind: Voices of Women, Adolescent Girls, Elderly and Disabled People, and Sanitation Workers' (WSSCC and FANSA 2016) 17-18; Burt et al (n 6) 23.

¹⁹ Vatsalya (n 17).

²⁰ *ibid* 5.

²¹ I Winkler & V Roaf, 'Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality' (2015) 21(1) *Cardozo Journal of Law & Gender* 1; S Yasmin et al, 'Menstrual Hygiene Among Adolescent School Students: An In-Depth Cross-

when girl students do not change the absorbents at school due to lack of adequate facilities or due to the fear of being noticed by male students and staff.²²

The cultural taboo around menstruation imposes several access and movement restrictions on women and girls. At the household level, this includes restriction to enter kitchen, restriction to sleep on a bed, restriction to eat certain food, and prohibition to touch holy books.²³ Restrictions are not limited to private spaces. For instance, most of the Hindu temples, if not all, prohibit the entry of women during menstruating days on the grounds of purity and pollution. Certain temples prohibit the entry women for the whole period from menarche to menopause. These restrictions have triggered a campaign to challenge the cultural construct of menstruation, namely 'Happy to Bleed'.²⁴ A litigation is pending before the Supreme Court of India that challenges the banning of women of certain age (after puberty and before menopause) from entering the Sabarimala temple situated in the state of Kerala.²⁵ Thus, women are discriminated both in private spaces and public places on the ground of this basic bodily function.

At the same time, the view that associates menstruation with factors such as fear and embarrassment has been contested. For instance, Joseph argues that the ongoing discourse on MHM that is centered around access to sanitary napkins and toilets is a misplaced one because it does not reflect the reality in India and it does not take into consideration the existing practices of MHM followed by women in India. She further argues that the promotion of sanitary napkins as a solution to MHM related issues is primarily meant to facilitate companies that produce

Sectional Study in an Urban Community of West Bengal, India' (2013) 5(6) IOSR Journal of Dental and Medical Sciences 22.

²² WSSCC and FANSA (n 18) 17-18; Burt et al (n 6) 23.

²³ Vatsalya (n 17) 8; S Bharadwaj and A Patkar, Menstrual Hygiene Management in Developing Countries: Taking Stock (Junction Social 2004).

²⁴ G Pandey, 'Why are Indian Women 'Happy to Bleed'?' (23 November 2015) <www.bbc.co.uk/news/world-asia-india-34900825>.

²⁵ PS Tripathi, 'Notion of Impurity' *Frontline* (13 May 2016) <www.frontline.in/cover-story/notion-of-impurity/article8523635.ece>; A Vishwanath, 'SC Reserves Order on Referring Sabarimala Temple Entry Case to Constitution Bench' *Live Mint* (21 February 2017) <www.livemint.com/Politics/4kBf0SoPdD9CEjxLPio7mO/SC-reserves-order-on-referring-Sabarimala-temple-entry-case.html>.

sanitary napkins to enter into the huge untapped market of India.²⁶ This is inadequate to conclude that the prevalent discourse on MHM is western centric and therefore to be rejected. At the same time, the critique points to the need for more studies to understand women's practices and everyday experience in India to feed into the formulation of a conceptual and implementation framework that is suitable to the Indian context.

3) Gender-based violence

Gender-based violence particularly in the context of open defecation and access to community sanitary complexes or public toilets is another key concern. Studies, mostly based on anecdotal narratives from urban and peri-urban areas, have highlighted instances of violence against women including sexual violence that could be linked to lack of sanitation facilities at home or near home.²⁷ Given the fact that women prefer to go for open defecation early in the morning or late at night, they become 'prisoners of daylight'.²⁸ Sometimes they have to walk long distances to find isolated places such as open areas or vacant lots to defecate. This may increase their vulnerability to verbal and/or sexual harassment, non-physical intimidation, threat of violence or actual assault and abduction.²⁹ The conversion of open spaces leads to the reduction of the availability of places for open defecation and this may further increase their vulnerability.

Safety and security concerns related to sanitation are discussed more in the context of urban sanitation. Studies on similar concerns in the rural sanitation context are virtually non-existent. Nevertheless, newspapers have reported a

²⁶ S Jospeh, 'Why India Doesn't Need the Sanitary Napkin Revolution' *Swarajya* (19 July 2015) <<https://swarajyamag.com/culture/why-india-doesnt-need-the-sanitary-napkin-revolution>>.

²⁷ eg JAGORI, Women's Rights and Access to Water and Sanitation in Asian Cities (JAGORI 2011); T Khanna and M Das, 'Why Gender Matters in the Solution towards Safe Sanitation? Reflections from Rural India' (2015) 11(10) *Global Public Health* 1.

²⁸ UNICEF, 'Gender and Water, Sanitation and Hygiene (WASH)' (2010) <www.unicef.org/esaro/7310_Gender_and_WASH.html>.

²⁹ JAGORI (n 27); A Nallari, 'All We Want are Toilets Inside Our Homes!' The Critical Role of Sanitation in the Lives of Urban Poor Adolescent Girls in Bengaluru, India' (2015) 27(1) *Environment and Urbanization* 73.

number of incidents of sexual violence from rural areas in the context of open defecation.³⁰

Fieldwork in rural Rajasthan and rural Uttar Pradesh brings out mixed reflections on this issue. Women in some places did not highlight any issue of physical or sexual violence in the context of open defecation. At the same time, Vanangana, an organisation working with dalit women in the Chitrakoot district of Uttar Pradesh, confirmed that sexual harassment occurs sometimes. It was also mentioned that sometimes people use the allegation of sexual harassment to settle other disputes, for instance land disputes. A random search for cases from various high courts and the Supreme Court of India has revealed that a large number of sexual harassment cases including rape cases that are allegedly linked to open defecation have been reported from rural areas.³¹

Violence against women or the fear of violence against women, most importantly in the context of open defecation is a concern relevant in the context of the right to sanitation. Violence or fear of violence while exercising basic biological needs like defecation and urination is incompatible with the idea of fundamental rights as recognised in the Constitution of India and the right to sanitation as interpreted to be part of the fundamental right to life by the higher judiciary in India.

While violence against women and the risk for women are often discussed in the context of sanitation, particularly in the context of open defecation, it is very important to underline that lack of toilets and the consequent need to go for open defecation are not probably the most important root causes of violence against women. Rather open defecation provides yet another ‘opportunity’ for men to

³⁰ eg M Kumar, ‘Rapists on Prowl in Loo-less Rural Bihar’ *Times of India* (17 January 2013) <<http://timesofindia.indiatimes.com/city/patna/Rapists-on-prowl-in-loo-less-rural-Bihar/articleshow/18055170.cms>>; S Sharda, ‘Gender Crimes Haunt Women who Head to Field for Nature’s Call’ *Times of India* (6 July 2013) <<http://timesofindia.indiatimes.com/india/Gender-crimes-haunt-women-who-head-to-field-for-natures-call/articleshow/20942886.cms>>.

³¹ eg *Tasleem S/o Masoom v State of Uttar Pradesh Jail Appeal Nos 5728, 5729 and 5730 and Criminal Appeal No 5844 of 2005*, Judgment of 10 July 2006 (High Court of Uttar Pradesh). For a discussion of cases, see S Koonan and L Bhullar, ‘Access To ‘Safe’ Sanitation for Women: Questioning A Myopic Approach’ in K J Joy, Suhas Paranjape and Sarita Bhagat (eds), *Conflicts around Domestic Water and Sanitation in India: Cases, Issues and Prospects* (SOPPECOM 2014) 182.

commit violence against women. The issue is more social and cultural than infrastructural. The hierarchical order of the society based on gender (and caste) is probably the root cause of gender-based violence. Thus, Naqvi argues that:

Public acts of humiliation and subjugation of 'low' castes are the norm in rural India. And the 'low-caste' woman-body, a site of multiple meanings (as unclean and forbidden, yet desired and easy object for upper-caste consumption, and site for vengeance and subjugation), is often the target. What is novel is that more and more of her screams are slipping out from the silenced hinterland, and piercing the urban eardrum.³²

4) Lack of sanitation and implications for the right to education and work

Inadequate or lack of sanitation facilities at schools impacts female students and teachers disproportionately. For instance, a few young girls in rural Uttar Pradesh mentioned that they do not go to the toilets at schools either because they are very dirty or they are locked or due to inadequate facilities such as water supply. This means they wait until they reach home. This could also mean that they avoid drinking enough water.

Lack of toilets has also been cited as a factor impacting the realisation of the right to education of girl students.³³ The Supreme Court of India observed in a case concerning the right to education that parents are reluctant to send their daughters to schools where toilets do not exist.³⁴ Lack of adequate facilities to change sanitary pads or for disposing the used pads may push girl students to stay back home during menstruating days. The *Swachh Bharat Swachh Vidyalaya* handbook issued by the Union Government has highlighted the positive impact of the availability of sanitation facilities on the attendance of girl students and increased retention of female teachers.³⁵

However, the absence of adequate toilet facilities in schools may not always be the key reason for absenteeism or dropping out of girl students from schools. It

³² F Naqvi, 'Hanging from a Tree' *The Hindu* (6 June 2014) <www.thehindu.com/opinion/op-ed/hanging-from-a-tree/article6086148.ece>.

³³ Government of India, *Swachh Bharat Swachh Vidyalaya—A National Mission* (Government of India 2014).

³⁴ *Environment and Consumer Protection Foundation v Delhi Administration* Writ Petition (Civil) No 631 of 2004, Judgment of 3 October 2012 (Supreme Court of India).

³⁵ Government of India (n 33).

could be a part of the general cultural response that seeks to impose more restrictions on girls when they reach the age of puberty. Empirical studies conducted in other jurisdictions have highlighted that the impact of MHM on education of girls is an exaggerated claim and in some cases, the dropping out of girl students when they reach puberty is not primarily due to the absence of infrastructure for MHM at schools but due to the fear of the parents that the girls may enter into pre-marital sexual relationship.³⁶ The fear of parents about the pre-marital pregnancy of their daughters is also an influencing factor in this regard.³⁷

Similarly, the absence of toilet facilities at workplaces and public places is also an issue from women's point of view and it shows the prevailing insensitivity to the sanitation needs of women particularly in public places. This scenario affects women disproportionately when compared to men particularly in sectors such as the construction sector where women are more in numbers as employees. For example, the absence of toilet facilities in such places may push women working there either to wait until they reach home or to knock the door of nearby houses. Similarly, women construction workers face a lot of problems because of the lack of sanitation problems.³⁸ The problem is worse during menstruating days because either they have to suffer the discomfort of not being able to change the absorbents they use or to compromise their income by walking back home to change the absorbents. It is also not uncommon that women skip their work during the days of heavy menstrual flow.³⁹

5) Manual scavenging: an added vulnerability

Manual scavenging is another sanitation-related issue important from a gender perspective. The practice of manual scavenging is a site of violation of several

³⁶ D Joshi et al, 'Menstrual Hygiene Management: Education and Empowerment for Girls?' (2015) 34(1) *Waterlines* 51; E Oster and R Thornton, 'Menstruation, Sanitary Products, and School Attendance: Evidence from a Randomized Evaluation' (2011) 3 *American Economic Journal: Applied Economics* 91.

³⁷ *ibid.*

³⁸ D Rajaraman et al, 'A Qualitative Study of Access to Sanitation amongst Low-Income Working Women in Bangalore, India' (2011) 1(1) *Journal of Water, Sanitation and Hygiene for Development* 432.

³⁹ *ibid.*

legally guaranteed rights including constitutional rights and the right to sanitation is one of them. The indignity and sufferings of manual scavengers are highly gendered as is evident from the fact that an overwhelming majority of manual scavengers are dalit women. The practice of manual scavenging exposes how caste and gender cumulatively aggravate the condition of dalit women when compared to men. Legal issues related to the practice of manual scavenging are discussed in chapter six and therefore not covered here.

B. EXAMINING THE GENDER SENSITIVITY OF THE LAW AND POLICY FRAMEWORK

As noted in the previous section, women face a number of sanitation-related risks and vulnerabilities. These risks and vulnerabilities negatively affect their dignity, autonomy and well-being and therefore antithetical to the fundamental rights enshrined in the Constitution of India including the right to sanitation. Broadly the issue raises questions related to gender equality in the context of sanitation.

Gender equality is one of the basic norms in the Constitution of India. The right to equality as enshrined in the Constitution of India prohibits different forms of discrimination including discrimination based on sex.⁴⁰ The concept of equality as envisaged in the Constitution of India is not limited to formal equality. Equality is to be understood as a goal to be achieved in a society where discrimination, oppression and violence on the basis of caste, class and gender persists. The Constitution of India, therefore, provides for positive discrimination and empowers the State to make special provisions in favour of the oppressed and the marginalised groups of the society including women.⁴¹ This is an enabling provision to ensure that the principle of equality does not hinder the positive discriminatory measures adopted by the State.⁴² The Constitution of India thus recognises the need to treat the vulnerable and the marginalised groups of the society differently to achieve the goal of equality. In the context of gender equality, the Constitution of India legitimises positive measures in favour of

⁴⁰ Constitution of India 1950, arts 14 and 15.

⁴¹ *ibid* art 15(3).

⁴² MP Jain, *Indian Constitutional Law* (Wadhwa 5th edn 2003) 1060-61.

women to achieve the goal of substantive equality. In the gender context, it could also be seen as a moral duty of the State to take special measures to address the concerns and issues of women so that equality means both the formal as well as the substantive equality.⁴³

Several legal changes have been introduced in the past to mitigate gender inequality, for instance the law on domestic violence,⁴⁴ the amendment of the Hindu Succession Act, 1956 to make Hindu women's inheritance rights in land at par with men⁴⁵ and a series of laws to address gender inequality at work.⁴⁶ Gender issues in the specific context of sanitation needs to be understood and examined in this broader context. The remaining part of this section, in this background, examines how the law and policy framework has responded to the issue of gender inequality vis-à-vis sanitation. This examination is relevant from two angles. On the one hand, the law and policy framework is expected to mitigate gender inequality and on the other hand the law and policy framework is not supposed to perpetuate inequality and disempowerment by actions or inactions.

The statutory framework relating to sanitation is, by and large, gender neutral in its approach. It imposes a generic responsibility on local bodies and other relevant agencies to maintain sanitation.⁴⁷ The statutory framework does not particularly highlight or address sanitation-related needs and concerns of women. An exception, although limited in scope, can be seen in some statutes that provide for separate toilets for men and women.⁴⁸ In a society that is structurally biased towards men and where status quo means domination of men over women, a

⁴³ For a discussion on positive duties in the context of the right to equality, see S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) Ch 7.

⁴⁴ Protection of Women from Domestic Violence Act 2005.

⁴⁵ Hindu Succession (Amendment) Act 2005. See also B Agarwal, 'Landmark Step to Gender Equality' *The Hindu* (25 September 2005) <www.thehindu.com/thehindu/mag/2005/09/25/stories/2005092500050100.htm>.

⁴⁶ K Sankaran and R Madhav, 'Gender Equality and Social Dialogue in India' (International Labour Office, Working Paper 1 2011).

⁴⁷ Statutes relevant in the context of the right to sanitation are discussed in Chapter 2.

⁴⁸ eg Right of Children to Free and Compulsory Education Act 2009; Factories Act 1948; Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996.

gender-neutral approach to sanitation is likely to undermine sanitation needs and concerns specific to women.

While statutes follow a gender-neutral approach, the policy framework governing sanitation appears to be more progressive in recognising gender-related issues and concerns in the context of sanitation. For instance, one of the main objectives of the first flagship programme on rural sanitation—the CRSP—was to provide privacy to women and protect their dignity.⁴⁹ The recognition of the special needs and concerns of women, more or less, continued in the subsequent programmes as well. The TSC also included explicit provisions addressing the concerns of women. For example, a key factor to decide the place of Community Sanitary Complexes was their acceptability and accessibility for women.⁵⁰ In 2012, the TSC was further replaced by the NBA, which represents a step backwards because while it re-asserts the objectives of the CRSP, it states that the location of community sanitary complexes should be acceptable and accessible to ‘all’—thus, removing the previous reference to specific vulnerable groups, including women.⁵¹ The Rural Sanitation and Hygiene Strategy adopted by the Union Government is more explicit in recognising the vulnerability of women and it emphasises the importance of ‘addressing inequalities in access with special attention to vulnerable groups such as women...’⁵²

The ongoing SBM also follows this approach. For instance, the SBM requires that ‘requirements and sensitivities related to gender including dignity and safety issues’ are to be taken into account at all stages of sanitation programmes from planning to post implementation.⁵³ Participation of women is also made

⁴⁹ See Nirmal Bharat Abhiyan Guidelines 2012, 5.

⁵⁰ Total Sanitation Campaign Guidelines 2011.

⁵¹ Nirmal Bharat Abhiyan Guidelines 2012.

⁵² Government of India, Towards Nirmal Bharat: Rural Sanitation and Hygiene Strategy 2012-2022 (Government of India 2011) 2.

⁵³ Swachh Bharat Mission—Gramin Guidelines 2014, para 5.9.1.

mandatory by prescribing that at least 50 per cent of the members of the Village Water and Sanitation Committee should be women.⁵⁴

The policy framework in the urban sanitation context are not as explicit and elaborate in highlighting women's sanitation needs and concerns as the rural sanitation policies. While the SBM-Urban is generally silent in this regard, the NUSP considers women as one of the sections more vulnerable due to poor sanitation.⁵⁵

MHM is an issue that has gradually received more attention than many other issues. The policy framework was completely silent on MHM until recently. For instance, the erstwhile framework for rural sanitation, the NBA Guidelines 2012, was silent on MHM. However, the NBA Guidelines was amended in 2013 to add a separate paragraph to recognise the menstruation related sanitation needs of women and girls.⁵⁶ Beyond the explicit recognition, the amendment called for two specific kind of actions. One was to utilise the fund allotted for the awareness creation activities for raising awareness, information and skills on MHM and the other was to utilize the fund allotted for solid and liquid waste management for the safe disposal of used absorbents. Similar approach has been taken by the SBM-Gramin Guidelines as it underlines women's sanitation needs linked to menstrual cycle and calls for a special attention to MHM.⁵⁷

In 2015, the Government of India took a more expansive approach by adopting a specific document on MHM.⁵⁸ It provides a conceptual framework that consists of

⁵⁴ ibid para 7.6.2. Village Water and Sanitation Committee is envisaged as a standing committee of the GP (local body at the lowest level in rural areas). It is to be noted that the National Rural Health Mission envisages a Village Health, Sanitation and Nutrition Committee as a standing committee. While these are guidelines by the Union Government, the relevant state governments are supposed to decide how these committees are to be named or constituted under the relevant law regulating rural local bodies.

⁵⁵ National Urban Sanitation Policy 2008, para 2.

⁵⁶ Modification in Nirmal Bharat Abhiyan Guidelines Including Activities Related to Menstrual Hygiene Management as a Permissible Activity, Doc No W.11013/16/2013-NBA (Part) (10 December 2013).

⁵⁷ Swachh Bharat Mission-Gramin Guidelines 2014, para 5.9.2.

⁵⁸ Menstrual Hygiene Management—National Guidelines 2015
<www.mdws.gov.in/sites/default/files/Menstrual%20Hygiene%20Management%20-%20Guidelines_0.pdf>.

mainly two aspects. First, the aspect of enhancing a scientific understanding of the biological process of menstruation and the need to address the question how it should be managed without any adverse implication for the health of the concerned woman or girl and by ensuring the quality of the environment. Second, the aspect of facilitating access to necessary infrastructure and products such as separate toilets, affordable and accessible absorbents, water, soap and mechanism for safe disposal of used absorbents.⁵⁹ The MHM Guidelines 2015 underline that it is the duty of the government to ensure these two aspects of safe and hygiene MHM.⁶⁰ The issue of MHM is also addressed under the National Rural Health Mission—an initiative by the Ministry of Health and Family Welfare of the Union Government.⁶¹ It also follows the same conceptual framework and mode of interventions, that is the supply of low cost sanitary napkins to adolescent girls in the age group of 10-19 years (a packet of six napkins for rupees six). It promotes door-to-door supply, and supply through the platforms of schools and anganwadis, of low cost sanitary napkins.

MHM is one issue in this regard where the statutory framework is more explicit. The Solid Waste Management Rules 2016 has included explicit provisions related to MHM.⁶² The government, more importantly ULBs, is duty bound, under the Rules, to set up mechanisms for collection, transportation, treatment and disposal of municipal solid waste in a safe manner. While this general duty is applicable in the case of safe disposal of the used absorbents, the Rules more directly and explicitly lay down norms on the duties of individuals and companies in the context of MHM. The Rules makes it a duty of the manufacturers of sanitary napkins to ‘explore the possibility of using all recyclable materials in their products’.⁶³ It is also a duty of the manufacturers to provide a pouch or a wrapper

⁵⁹ *ibid* 6.

⁶⁰ *ibid* 2.

⁶¹ Scheme for Management of Menstrual Hygiene Among Adolescent Girls in Rural India, Ministry of Health and Family Welfare, DO No M/12015/103/2010-MCH (4 Mach 2016) <http://nrhm.gov.in/images/pdf/programmes/mhs/Guidelines/Revised_Guidelines_for_Menstrual_Hygiene_Scheme.pdf>.

⁶² Solid Waste Management Rules 2016.

⁶³ *ibid* r 17(1)(3).

for disposing the used napkins.⁶⁴ The Rules are also more explicit in laying down the duty of the users of napkins to wrap the used napkins securely in the wrapping material provided by the manufacturer.⁶⁵

The policy developments on MHM including the specific recognition of MHM as an issue under the policy framework is not completely a development evolved at the domestic level. In fact, the role of international organisations is significant. For instance, the WSSCC has been strongly advocating for the explicit recognition of MHM in the policy framework related to sanitation. The specific amendment of the NBA Guidelines in 2013 to include MHM is a direct influence of the WSSCC.⁶⁶ The influence of the WSSCC is further clear from the fact that the conceptual framework followed in the policy documents in India is substantially similar to what the WSSCC has promoted through its publications and training programmes in India.⁶⁷ The influence of international organisations in this regard has been contested on the ground that it blindly imports a western conception of hygiene and does not reflect the reality and practice in India.⁶⁸

Sanitation issues and concerns of women are recognized, at least to some extent, in the law and policy framework. While this is a positive development, an even more important concern is the extent to which this official recognition has been translated into actions at the implementation level or the extent to which the official recognition has influenced and informed the implementing agencies. These issues are addressed in the next section.

⁶⁴ *ibid* r 17(1)(3).

⁶⁵ *ibid* r 4(1)(b).

⁶⁶ 'WSSCC Supports Indian Government Effort to Integrate Menstrual Hygiene in Key Sanitation Programme' <<http://wsscc.org/2013/12/20/wsscc-supports-indian-government-effort-integrate-menstrual-hygiene-key-sanitation-programme/>>.

⁶⁷ WSSCC, Menstrual Hygiene Management: Training of Master Trainers (WSSCC 2013).

⁶⁸ Joseph (n 26).

II. IMPLEMENTATION FRAMEWORK: NEGLECT, OBJECTIFICATION AND GENDER INEQUALITY

An examination of the implementation of sanitation interventions in rural and urban areas reveals that the law and policy framework for the realisation of the right to sanitation pays only lip service to the sanitation-related issues and concerns of women. The implementing agencies are, by and large, following a gender-neutral approach to sanitation. This does not mean that the law and policy framework for sanitation is completely a failure. Indeed, in some cases, for instance in planned areas in urban India, toilets may help women (and men) to carry out their basic sanitation needs with dignity and privacy. However, this is an exception when compared to the sanitation experience of a vast majority of women such as women living in rural areas, small towns, urban slums and pavements.

Thus, there is a huge gap between what is stated in the law and policy framework and what actually is happening in the field. At the implementation level, either women's rights and concerns are not addressed at all or they are used in a way that satisfies the existing patriarchal nature of the society. This scenario is incompatible with the idea of right to sanitation of women among many other human rights such as the right to equality.

A. DISREGARD FOR DIGNITY AND PRIVACY

The statutory and policy framework for sanitation interventions has been using dignity and privacy of women as rationales for various sanitation interventions. However, these concerns mostly remain at the policy level and they hardly shape the way sanitation interventions are being implemented. Privacy and dignity of women in the context of realisation of their right to sanitation do not seem to have influenced or guided the implementation of sanitation interventions. This is evident from the fact that household toilet coverage is still inadequate in rural and

urban areas.⁶⁹ Despite the fact that sanitation interventions have been in force over the last few decades, many state governments did not take any initiative to implement them until recently. For instance, rural sanitation interventions were, by and large, dormant in the State of Uttar Pradesh until a couple of years ago. This indicates the fact that privacy and dignity of women have failed to trigger state governments to implement sanitation interventions.

The insensitivity to the issues of privacy and dignity of women is also clear from the way access to toilet is being promoted in rural and urban areas. The policy framework for sanitation has followed the perception that the availability of toilet would by itself lead to its use by everyone. This approach is myopic to the social and cultural norms that constrain the way in which women take care of their sanitation needs. Further, women are not consulted while taking decisions both at the panchayat level as well as at the household level. A group of women in Sagrampur village in Uttar Pradesh stated that they were not consulted while building toilets. The exclusion of women may lead to decisions that are gender neutral and thus the needs and concerns of women may get ignored. For instance, a toilet constructed at the front side of a house makes it difficult for women to use it because this is a space mostly occupied by men and guests.⁷⁰

Similarly, in the case of public or community toilets in urban areas, there seems to be an assumption that having an adequate number of separate toilets for women is sufficient to ensure dignity and privacy of women. Factors such as the working time of public toilets and the presence of men in women's toilet complexes are generally overlooked. For instance, the presence of men in the toilet complex and the use of community toilet complexes or public toilets by men and boys for various purposes including for rearing pigeons makes it difficult for women to use them.⁷¹ This scenario demonstrates the huge gender bias where implementation is

⁶⁹ According to Swachhta Status Report 2016, 45.3 per cent of households in rural areas have sanitary toilets. In urban areas, 88.8 per cent of the households have sanitary toilets. See Government of India, Swachhta Status Report 2016 (Government of India 2016).

⁷⁰ K O'Reilly, 'Combining Sanitation and Women's Participation in Water Supply: An Example from Rajasthan' (2010) 20(1) *Development in Practice* 45.

⁷¹ Khosla and Dhar (n 13).

dominated by men's understanding and perception of sanitation problems and needs of both women and men.

The overlooking of the need for public toilets further reflects the narrow understanding of the privacy and dignity of women by sanitation interventions. The ongoing sanitation interventions primarily and overwhelmingly focus on household toilets and consequently sideline the provision of community toilets and public toilets. The lack of focus on community toilets and public toilets affects women disproportionately particularly working women and homeless women as noted in the previous section. It appears that sanitation interventions have so far focused on dignity and privacy of women while they are at home. Further, the focus has been limited to houses where adequate space is available to build a toilet or to people who can afford to build a toilet in their houses. Overall, it neglects the fact that women go for work and it also neglects the rights of the poor. This is particularly important in a context where a significant number of women in rural and urban areas go for work to earn their livelihood.

B. MHM: GAP BETWEEN POLICY RECOGNITION AND PRACTICE

The explicit recognition of MHM as a sanitation issue is indeed a progressive step. However, its contribution to the actual realisation of the right to sanitation depends upon how these concerns are reflected in the implementation of sanitation interventions. Fieldwork conducted in rural Rajasthan and rural Uttar Pradesh shows that MHM is not yet a serious concern for implementing agencies and they almost exclusively focus on toilet construction. Implementing agencies at the local level generally hold the view that 'other' sanitation concerns including MHM will be taken up after achieving the ODF status. This approach is probably a consequence of the pressure from the top (state level and central level agencies) to eliminate open defecation as a priority. For instance, implementing agencies at the local level are expected to report periodically the number of toilets that have been built in their jurisdiction. At the same time, similar degree of focus or pressure is absent in the case of concerns and needs related to MHM.

Certain state governments have started modest efforts to address MHM as part of their sanitation interventions. For instance, the National Rural Health Mission's Scheme for Promotion of Menstrual Hygiene among Adolescent Girls in Rural India covers thirteen districts in Uttar Pradesh. Additionally, in 2015, the State Government announced the target of 100 per cent menstrual hygiene and sanitary napkin coverage by 2017 for all girls between the age group of ten and nineteen years, studying in Class six to Class twelve of government-run schools.⁷² As a result, pilot projects have been started in the districts of Barabanki, Mathura and Mahoba where certain women's groups are producing and selling low-cost sanitary napkins. Similar initiatives are also in the pipeline in Kerala. A girl friendly toilet was found to be in operation in a public place in Chirakkal panchayat in Kannur District in Kerala and government officials stated that the idea is being promoted in schools.

However, the major focus of the initiatives in the context of MHM is to make available toilet facilities and sanitary napkins. The disposal of used sanitation napkins is still an unresolved and an unattended issue. A senior official of the Kerala Suchitwa Mission, the agency responsible for implementing sanitation interventions in the State, in a personal interview admitted that the use of sanitation napkins has been increased manifold and it poses serious challenge from an environment point of view. According to her, burning or burying seems to be the only options available for the users for the time being. Therefore, there is a lot more to be done insofar as MHM is concerned both in terms of conceptual understanding and infrastructure development.

⁷² K Dutta, 'UP State Govt to Provide Free Sanitary Napkins to School Girls' *Hindustan Times* (26 July 2015) <www.hindustantimes.com/noida/up-state-govt-to-provide-free-sanitary-napkins-to-school-girls/story-4luvS2tF4Zl9aIbOMR3eaO.html>. Similar initiatives had been announced in other states as well. See R Gaikwad, 'Free Sanitary Napkins for Bihar Schoolgirls from April: Nitish' *The Hindu* (13 February 2014) <www.thehindu.com/news/national/other-states/free-sanitary-napkins-for-bihar-schoolgirls-from-april-nitish/article5685534.ece>.

C. WOMEN AS ‘OBJECTS’ AND ‘TARGETS’

Sanitation interventions in India pay lip service to the issues and concerns of women. While the implementation of sanitation interventions hardly contributes to the realisation of the right to sanitation and other rights of women, some of the strategies followed by sanitation interventions have adversely affected the rights of women, most importantly the right to gender equality.

The awareness creation programme (known as triggering programme among implementing agencies and various developmental agencies) is one area where the policy framework liberally uses the idea of dignity and privacy of women. This is problematic to the extent that it uses and reinforces the social and cultural norms that define the inferior status of women. It is an irony that many of these norms are in fact the root causes of the increased sanitation burden of women. For instance, implementation of sanitation interventions in Rajasthan have used women specific narratives to motivate people to construct and use toilets. One of the common narratives is that women handle child excreta and prepare food without properly cleaning their hands with soap which affects the health of all family members. Another narrative is that women usually wipe their hands with their *saree* after handling children's excreta and the same part of the saree is then used to wipe the washed utensils which leads to the mixing of faecal matter with food. The discriminatory and oppressive practices such as the *purdah* system⁷³ have also been used to invoke the male prestige to promote the construction of toilet at houses. In certain districts, implementing agencies admitted that they ask the question to men “how they can let others see ‘their’ women defecating in open while they do not let others see even the face of ‘their’ women”.

Implementing agencies in Uttar Pradesh also have used similar narratives. For instance, a large number of public posters and paintings produced as part of awareness creation programme in the State have projected toilets as an essential

⁷³ O'Reilly explain the purdah system in the following words: “Regardless of their age, women living in their in-laws' homes practice purdah (literally 'curtain'), which entails remaining inside the family compound, covering their faces (*ghuunghat*), and speaking little or quietly in front of strangers, senior men, and senior women. Unmarried girls who live with their parents do not practice *purdah* or *ghuunghat*”. See O'Reilly (n 70) 5.

infrastructure to ensure the dignity of women. In certain cases, the approach has gone to the extent of depicting a man declaring the need to protect the dignity of women in his house by building a private toilet. In another poster, it was written as a declaration from a mother that ‘I shall let my daughter marry a man only if he has a private toilet in his house’.

These narratives convey the message that links toilets with the dignity only of women and not men. Further, it uses stereotype images and the role of women defined by patriarchy to promote construction and use of toilet. From a right to sanitation point of view, dignity and privacy in the context of defecation are relevant for everyone, not just for women. Ideally such posters and paintings must challenge the existing social norm that applies different standards of dignity and privacy to women and men in the context of defecation. However, it does exactly the opposite by reinforcing the existing patriarchal social norms.

The strategies of intimidation and shaming used by implementing agencies to eliminate open defecation also target women specifically or affect women disproportionately. For instance, the *Nigrani* Committee (monitoring committee) roams around the village early in the morning to prevent people from going to the field for open defecation or the members of the *Nigrani* Committee blow a whistle when they spot someone defecating in the open. Some of the *Nigrani* committee members in Rajasthan, during interview, admitted this as a key strategy. While this is not specifically against women, it may turn out to be embarrassing for women in a context when men are the members of the *Nigrani* Committee. The strategy of intimidation also includes reminding women of the risks of sexual violence while doing open defecation. For instance, implementing agencies in Uttar Pradesh stated that they show cuttings from newspapers that report instances of sexual harassment or rape of women while carrying out open defecation.

The narratives and strategies prejudicial to women are not limited to the states of Rajasthan and Uttar Pradesh. Implementing agencies in other states also use similar strategies. For instance, in Madhya Pradesh, the implementation of

sanitation interventions in rural areas has been criticised for using humiliation (mostly targeting women) as a method to induce people to stop open defecation.⁷⁴

These narratives and strategies are justified on the ground that these are the ‘tools’ that work better and fast. For instance, a district collector in Rajasthan admitted that they use women specific narratives because that bring results. Thus, immediate sanitation results (ie toilet construction) get priority regardless of the fact that these strategies perpetuate the objectification and stigmatisation of women. The narratives and strategies also reflect the element of male domination in the making and implementation of policies because women are made ‘the target’ and ‘the object’ of awareness creation programmes by men although there is no data showing that women are predominantly the open defecators. On the contrary, experience from rural Rajasthan and rural Uttar Pradesh shows that men are more reluctant to use toilets than women. This is probably because men generally understand that toilets are built primarily for women as being promoted by the awareness creation programmes under the policy framework for sanitation.

The narratives mentioned above may not be completely a creation of the local level or state level implementing agencies. The role of agencies at the international level is also significant. For instance, the WSP has played a very important role especially in the state of Rajasthan. The WSP has provided training to officials of implementing agencies at least in some districts in Rajasthan, for instance Bikaner and Churu.⁷⁵ In the Churu district, the WSP was instrumental in developing a district level communication strategy.⁷⁶ The involvement of an influential international agency such as the WSP in training the district level officials probably explains the similarity in the narratives used by implementing agencies in different districts.

⁷⁴ M Poornima, ‘No Maryada for Women in MP Government’s Sanitation Drive’ *Hindustan Times* (24 December 2013) <www.hindustantimes.com/india/no-maryada-for-women-in-mp-govt-s-sanitation-drive/story-SExznZ6YDuy6kzM1bhpwfN.html>.

⁷⁵ WSP, ‘Compendium of Best Practices in Rural Sanitation in India’ (WSP 2013) 13, 14.

⁷⁶ *ibid* 39.

D. SAFETY AND SECURITY: LIMITATIONS OF CRIMINAL LAW AND SANITATION INTERVENTIONS

Legal responses to the issue of safety of women in the context of sanitation come from two different legal streams. Most importantly legal responses to the issue of gender-based violence come from two different legal streams—criminal justice system and sanitation interventions. Once the violence occurs, the matter falls within the domain of the criminal justice system. It is the duty of the State to prosecute and punish the offender(s) because a crime is seen primarily as an offence against the State. The root causes of the offence are not an important concern of the criminal justice system. The criminal justice system arguably creates a deterrent effect by prosecuting and punishing the offenders. However, there are several factors, including social, cultural and economic factors, that diminish the scope of the deterrent effect.

Violence against women, especially sexual violence, tends to be seen primarily as a matter of shame and dishonour for the individual and the community concerned rather than a violation of the body and mind of the woman concerned.⁷⁷ As a result, the community gets involved and tries to ‘settle’ the case. Although it is a well-established rule that statutory offences such as rape cannot be settled⁷⁸, this is not uncommon in different parts of India particularly in rural areas. The accused may confess his crime and offer to marry the victim or the panchayat may persuade the accused to do so, or the matter may be settled through monetary compensation. In some cases, the victim’s family may prefer to follow this approach to ‘protect the victim’s honour’ without seeking the victim’s opinion.⁷⁹ In such cases, filing of criminal cases will happen only when the ‘settlement initiatives’ under the auspices of the panchayat or the community fail. Courts have also acknowledged the existence of this practice, for instance in an occasion while

⁷⁷ Report of the Committee on Amendments to Criminal Law (Justice JS Verma Committee) (Government of India 2013) 93-94.

⁷⁸ Code of Criminal Procedure 1973, s 320.

⁷⁹ TNN, ‘When Rape Becomes a Reason for Marriage’ *The Times of India* (29 August 2013) <<http://timesofindia.indiatimes.com/india/When-rape-becomes-a-reason-for-marriage/articleshow/22131692.cms>>; B Karat, ‘When a Judge Suggests a Woman Marry Her Rapist’ *NDTV* (1 July 2015) <www.ndtv.com/opinion/jayalalithaa-this-rape-victim-needs-your-attention-777041>.

addressing the question whether delay in lodging a complaint due to this reason can be condoned.⁸⁰ At times, courts also encourage and facilitate the ‘settlement’ of criminal cases involving sexual offences.⁸¹ Further, a number of cases do not get reported due to the social stigma or taboo around sexual violence and as a result, the questions of prosecution and punishment do not even arise.⁸²

Even when the crimes get reported, there are several factors that affect the outcome of the case. In a number of cases, the absence of injuries or the failure to raise an alarm by the woman led to an adverse inference that she had, in fact, given her consent for the sexual act. In such situations, the benefit of doubt goes to the accused.⁸³ A review of cases, however, highlights various situations under which the absence of resistance can happen. Some cases highlight that the fear of reprisal or the threat to kill could be a reason for silence or the lack of resistance by the woman.⁸⁴ This may lead to the absence of struggle or resistance (and therefore no injuries on the victim’s person) and/or failure to make noise to attract the attention of the people.⁸⁵ In some other cases, the perpetrators made death threats to the victims⁸⁶ and their families⁸⁷ if the victim disclosed the fact of the incident to her family or reported to the police. Other possibilities include where the victim is tied up or drugged and raped.

However, it is to be noted that the existing criminal law disapproves this legal presumption of consent against woman in sexual violence cases. The Indian Penal

⁸⁰ *Shyam Nayak v State of Jharkhand* Judgment of 6 November 2007, MANU/JH/0661/2007 (High Court of Jharkhand).

⁸¹ eg *V Mohan v State* Criminal Appeal No 402 of 2014, Order of 18 June 2015 (High Court of Madras).

⁸² Human Rights Watch, “Everyone Blames Me”: Barriers to Justice and Support Services for Sexual Assault Survivors in India (Human Rights Watch 2017) 15.

⁸³ *Deva Anand Singh and Others v State of Bihar* Criminal Appeal No 274 of 1988, Judgment of 7 October 2009, MANU/BH/0435/2009 (High Court of Patna).

⁸⁴ *Satya Vir v State*, Criminal Appeal No 89 of 2004, Judgment of 17 September 2009 (High Court of Uttarakhand); *Satish Kumar Sahu v State of Chhattisgarh* Criminal Appeal No 1068 of 2002, Judgment of 16 January 2006, MANU/CG/0014/2006 (High Court of Chhattisgarh).

⁸⁵ In certain cases, the victim’s attempt to raise an alarm/cry for help was stopped by a threat to kill her by firearm or at gunpoint. See *Md. Khalil v State*, Criminal Appeal (SJ) No 81 of 1995, Judgment of 23 June 2011 (High Court of Patna).

⁸⁶ eg *Kabhaibhai Deshaibhai Rathod v State of Gujarat* Judgment of 24 April 2007, MANU/GJ/7011/2007 (High Court of Gujarat).

⁸⁷ eg *Satya Vir* (n 84).

Code provides that the fact that a woman did not physically resist penetration cannot be regarded as suggesting that she had consented to the sexual activity.⁸⁸ Courts have also repeatedly held that the absence of physical injuries does not mean that the woman had consented to the sexual act.⁸⁹

The scope of the criminal justice system in addressing the issue of safety of women in the sanitation context is limited because it addresses the delivery of justice once the crime has been committed. It hardly contributes to the prevention of crime except the limited deterrent effect it may create. It is in this context, that the role of sanitation interventions becomes important from the point of view of prevention of violence against women in the context of sanitation. Put it differently, the important question is whether women are able to exercise their basic bodily functions without the fear or risk of being violated.

Sanitation interventions may not be able to address directly the social and cultural reasons for violence against women. However, it can arguably make some interventions through the provisioning of sanitation facilities, for instance toilets in houses as well as in public places, so that one of the situations that leads to violence against women is minimised or eliminated. Although this step does not challenge the basic issue of patriarchy and gender-based power relations, it has been highlighted as an effective step in reducing at least a particular form of gender-based sexual violence, that is the risk of non-partner sexual violence.⁹⁰

However, there is also a viewpoint that some of the women interviewees shared that open defecation provides them an opportunity to socialise with other women in the village. From this point of view, the projection of toilets as a solution to gender-based violence in the context of open defecation impliedly seeks to restrict the movement of women to ‘save’ them from violence. This is an important issue

⁸⁸ Indian Penal Code 1860, Proviso to Explanation 2 (inserted by Criminal Law (Amendment) Act 2013).

⁸⁹ eg *Kapoor Alias Raj Kapoor v State of Madhya Pradesh* Criminal Appeal No 813 of 1990, Judgment of 2 March 2009 (Chhattisgarh).

⁹⁰ A Jadhav et al, ‘Household Sanitation Facilities and Women’s Risk of Non-partner Sexual Violence in India’ BMC Public Health (2016) <<https://bmcpublihealth.biomedcentral.com/articles/10.1186/s12889-016-3797-z>>.

in a context when freedom of movement of women are severely restricted particularly in rural areas. In this context, the argument that toilets are to be constructed to ‘save’ women from sexual violence reinforces the social control of women. Thus, sanitation interventions are also used as an instrument of social control. This also points to the cumulative impact of various policy interventions by different sectors like water and sanitation on freedoms and rights of women. Such interventions must not lead to the curtailment of the right to equality and the freedom of women to move around. However, this does not mean that open defecation is to be promoted to let women realise their freedoms and rights. Instead, sanitation interventions could address this issue in its own capacity by challenging the patriarchy to the maximum extent possible, by not using the existing patriarchal customs to promote the construction of toilets and by ensuring that sanitation interventions are not used as an instrument of social control.

III. ARTICULATING A GENDER SENSITIVE FRAMEWORK

The law and policy framework for sanitation in India is not completely insensitive to the gender dimensions of the right to sanitation. The norm of separate toilet for woman as enshrined in many statutes,⁹¹ the ongoing sanitation drive to promote the construction and use of toilets in houses and the new initiatives to ensure MHM are some of the important interventions that may contribute to the realisation of the right to sanitation of women among many other rights. These interventions, to some extent, address the concerns related to privacy, dignity, lack of information and lack of infrastructure facilities. However, an analysis of sanitation interventions reveals that they are still far from being adequately gender sensitive.

A major critique is that sanitation interventions, by and large, perceive sanitation needs and vulnerabilities of women as technical issues that can be fixed through technical solutions. The exclusive technical approach to gender related sanitation

⁹¹ eg Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996, s 33 and Contract Labour (Regulation and Abolition) Act 1970, s 18.

issues avoids conveniently the structural reasons and undermines its broader implications for gender equality. For instance, sanitation interventions do not consider the fact that the lack of water supply may make sanitation infrastructures such as household toilets an additional burden for women due to the social and cultural norm that makes fetching of water a responsibility of women and girls. Similarly, the special sanitation needs of women during pregnancy and post-natal period generally have not informed or shaped the policy decisions and their implementation.

An approach myopic to the structural reasons could also be seen in the way MHM issues have been defined and sought to be addressed. The framework for MHM in India is built upon the premise that girls do not have adequate information on how to carry out MHM or they do not get adequate information from their school or their parents. Another premise is that the lack of facilities is leading to the issues like school absenteeism (of female students and teachers). These premises, according to some critique, reinforce the patriarchal norms and also highlight the dominant position of international NGOs and intergovernmental organisations in determining the conceptual and operational boundaries of certain issues.⁹² While the increasing focus on MHM has enhanced the visibility of the issue, the existing statutory and policy framework, to some extent, seems to promote the idea of dealing with MHM discreetly and silently. The availability of, and accessibility to, infrastructure may be important, but at the same time it is equally important to challenge the cultural and social perceptions that make MHM difficult for women and girls.

While the policy framework does not take sanitation needs and vulnerabilities of women seriously, it proactively uses certain regressive practices and traditional roles of women to promote sanitation goals. The way the awareness creation activities are being conducted at the local level in the rural sanitation context reveals that they reinforce certain norms and practices that are rooted in the patriarchy. Thus, women become targets and beneficiaries of sanitation

⁹² Joshi et al (n 36) 54.

interventions. Ideally one would have expected the policy framework for sanitation to treat women primarily as right-holders, not beneficiaries. This brings forth the broader question of the implications of sanitation interventions on the right to gender equality.

The discourse on safety and security of women in the context of sanitation is also equally problematic from a gender equality point of view. The policy framework for sanitation projects toilets as the major sanitation intervention to mitigate the safety related risks of women. The logic seems to be to eliminate the exposure of women to risks. The risk in this context is mainly understood as risks from strangers in public spaces. While sanitation interventions such as toilets at houses and in public places could be justified and promoted on the ground of privacy and dignity, it is doubtful if such interventions could be similarly justified in the context of sanitation related safety and security concerns.

This is problematic for various reasons. It presumes that private spaces like houses are safer for women. This is highly contestable as the bulk of violence against women occur within the private space of houses. This was, for instance, the reason why a specific law was enacted to address the issue of domestic violence against women.⁹³ In an overwhelming majority of rape cases, offenders are not strangers, but people known to the victims.⁹⁴ Further, the strategy of restricting women in public spaces and confining them to private spaces based on the presumed safety of private spaces is regressive from the point of view of gender equality. It is inappropriate for the policy framework for sanitation to use the safety of women a logic to promote the construction and use of toilet. This amounts to the harassment of the potential victims of a crime or denying them their basic human rights under the garb of protection. In fact, such an approach is not an isolated legal response. For instance, the Government of Karnataka had banned woman from working in night shifts in shops and establishments in the

⁹³ Protection of Women from Domestic Violence Act 2005.

⁹⁴ National Crime Records Bureau notes that “out of 34,651 rape cases, in 33,098 cases the offenders were known to the victims accounting for 95.5% of total rape cases”, see National Crime Records Bureau, *Crime in India 2015—Statistics* (National Crime Records Bureau, Ministry of Home Affairs 2016) 85.

name of security.⁹⁵ Ideally, the safety of women is to be ensured by restricting the violators, not by restricting women.

An important underlying reason for the gender myopia of sanitation interventions is the fact that it tends to work within the existing patriarchal structure of the society. There is little or no participation of women both at the policy framing level as well as at the implementation level. This is, by and large, confirmed during the fieldwork as an overwhelming majority of the officials at the state, district and village levels are men. As a result, the basic nature of the institutional framework, its priorities and its approaches are largely informed by men's understandings.

This is probably a reason why the scenario is not so different even in places where district collectors or the Gram Panchayat presidents are women. In a majority of cases where women are the panchayat presidents, the name of the woman is just for the formal purpose probably because the seat was reserved for woman. In practice, the male members of the family of the female presidents (mostly husband or son) perform the duties. For instance, in a village in Bikaner district in Rajasthan, a person appeared for interview who introduced himself as '*sarpanch putr*' (son of the president). He admitted that he has been doing the work whereas his mother was the elected Panchayat President. I also had the opportunity to attend a few meetings of implementing agencies at the district level in Rajasthan where at least a few male members introduced themselves as representing a female member of his family who is the elected member of the panchayat or the president of the panchayat. This is also the case of Village Water and Sanitation Committees. Women are included in the committee because the policy framework insists that but several of them are even unaware of their membership. Thus, women are 'targets' and 'objects', but not an equal participant in the process of decision-making and implementation.

⁹⁵ PTI, 'Karnataka Notifies Law Banning Night Shift for Women' (10 May 2007) <<http://timesofindia.indiatimes.com/india/Karnataka-notifies-law-banning-night-shift-for-women/articleshow/2027282.cms>>.

The statutory and policy framework for sanitation is directly linked to the realisation of a fundamental right and therefore it is unacceptable for it to violate other fundamental rights. It is also imperative for sanitation interventions to respect and implement the right to gender equality. While sanitation interventions may have limitations to make social/cultural changes immediately, it is absolutely impermissible to use the existing patriarchal practice such as the *purdah* system to achieve sanitation goals. This is probably one of the consequences of the technical approach coupled with the compartmentalised implementation strategy (legally and institutionally) where all frameworks are implemented within a narrow conceptual framework without recognising the inter-linkages.

SUMMARY

Sanitation needs and vulnerabilities of women have received significant policy and academic attention recently. As a result, issues such as safety, security and MHM have received policy attention at the domestic level as well as at the international level. However, despite the repeated assertion of the right to sanitation as a fundamental right under the Constitution of India and despite a number of provisions on safe and adequate sanitation facilities in various statutes, little has been achieved in terms of the realisation of the right to sanitation of women. Women continue to be treated as ‘targets’ and ‘beneficiaries’ of a framework predominantly controlled by men.

Gender equality, both formal and substantive, is a constitutional imperative in India. The Constitution of India envisages equal participation of women in decision-making and implementation processes. The need for affirmative actions has been progressively recognised in law, for instance in the form of reservations. This is one of the ways in which the Constitution of India and several statutes seek to ensure gender equality and to eliminate the historical oppression and discrimination inflicted upon women. Sanitation interventions are expected to work within the boundaries determined by the Constitution of India and relevant statutes. They need to respect and implement constitutional goals and statutory objectives. The implementation of sanitation interventions, for instance in rural Rajasthan and Uttar Pradesh, has almost completely ignored the basic legal

principles and rights in this regard. Overall, discussion in this chapter points to a scenario where the prevailing power relations in the Indian society and the consequent structural violence have managed to normalise women's sanitation-related sufferings to the extent of evading statutory and policy interventions.

SANITATION AND ENVIRONMENTAL POLLUTION: A RIGHTS PERSPECTIVE

Environment is an indispensable element of the right to sanitation and similarly sanitation is an unavoidable part of the right to environment. Almost all aspects of the right to sanitation have an environmental dimension. For instance, elimination of open defecation seeks to address pollution of water and land due to human excreta. Similarly, the component of MHM raises environmental concerns due to pollution caused by used sanitary napkins. The positive environmental externalities, thus, constitute an important justification for carrying out sanitation interventions and for articulating a right to sanitation. Similarly, sanitation is an important aspect of the right to environment so much so that the realisation of the right is impossible with lack of or insufficient sanitation facilities. From a rights perspective, the link between sanitation and environment extends to a mutually complementary and dependent link between the rights to sanitation and environment. In effect, the realisation of the right to sanitation facilitates the realisation of the right to environment and vice versa. Put it differently, lack of sanitation may impede the realisation of both the rights to sanitation and environment.

The mutually complementary link between sanitation and environment in India manifests in different ways. The lack of, or inadequate sanitation, may lead to environmental pollution. For instance, open defecation and disposal of untreated wastewater may lead to water pollution. At the same time, certain sanitation interventions, if not implemented properly, could lead to environmental pollution. This is, for instance, clear from the fact that a number of toilets constructed as part of sanitation interventions in rural areas are reportedly causing groundwater pollution. Similarly, a number of landfills that have been set up to manage solid waste are functioning in violation of the existing legal norms and standards and

consequently lead to land and water pollution. All these issues equally affect the realisation of both the rights to sanitation and environment. The link is further evident from the fact that some of these issues are addressed under environmental law in India, for instance the issue of disposal of used sanitary napkins and diapers are regulated under the Solid Waste Management Rules 2016 framed under the Environment (Protection) Act 1986. Thus, any framework that neglects or undermines this link is unlikely to be effective from the point of view of realisation of the rights to sanitation and environment because environmental sustainability is a key prerequisite for realisation of both these rights.

In this context, this chapter analyses the environmental dimensions of sanitation both from the perspective of the right to sanitation and the right to environment. The first section introduces some of the key environmental dimensions of the right to sanitation. The second section analyses how, and to what extent, the law and policy framework in India has addressed the key environmental dimensions explained in the previous section. It also addresses the question why the link between sanitation and environment has been undermined despite the existence of a number of legal norms and standards that address some of the key issues at the interception of the link between environment and sanitation. The third section advocates for a proper interface between the policy framework for sanitation and the legal framework addressing environmental dimensions of the right to sanitation so that everyone is able to realise both the rights to sanitation and environment.

I. ENVIRONMENTAL DIMENSIONS OF THE RIGHT TO SANITATION

A. HUMAN EXCRETA MANAGEMENT AND IMPLICATIONS FOR ENVIRONMENT

Management of human excreta is an important element of the right to sanitation and it reflects one of the important environmental dimensions of the right. If not managed properly, human excreta may cause serious environmental pollution, most importantly water pollution. There are mainly two types of sanitation

interventions to address the issue of environmental pollution due to human excreta—on-site mechanism (eg septic tanks and pits) and off-site mechanism (eg sewerage system).¹ Both these mechanisms may lead to environmental pollution if not implemented properly. Thus, lack of, or inadequate, mechanism for the management of human excreta is a challenge for the realisation of the rights to sanitation and environment.

1) Open defecation, toilets and water pollution

Open defecation is an important sanitation issue because of its link with water pollution among other things. Open defecation leads to bacteriological and chemical contamination of groundwater.² Toilets, if properly constructed and used, could contribute significantly to control the groundwater pollution. This makes toilets an important sanitation intervention from the point of view of realisation of the rights to sanitation and environment. However, toilets per se do not prevent environmental pollution due to human excreta. The technology and the design of toilets play crucial role in this regard. It is in this context the environmental implications of toilets assume importance.

The number of toilets, both in rural and urban areas, have been constantly increasing mainly as a result of sanitation interventions. According to the data provided in the website of the SBM, more than 63 million toilets have been constructed since the launch of SBM on 2 October 2014.³ An overwhelming majority of these toilets are connected to on-site management systems. Sewerage system is virtually absent in rural areas and therefore, toilets are connected to

¹ UN Water, World Water Development Report 2017: Wastewater—the Untapped Resource (UN Water 2017) 42.

² AV Rajgire, ‘Open Defecation: A Prominent Source of Pollution in Drinking Water in Villages’ (2013) 2(1) International Journal of Life Sciences Biotechnology and Pharma Research 238.

³ Data as on 16 February 2018. The most latest data can be accessible at <http://sbm.gov.in/sbmreport/home.aspx>.

septic tanks or pits. In urban areas, around 48 per cent of the households depend on on-site facilities.⁴

The increasing number of toilets poses significant threat to water quality. One of the major concerns in this regard is the tendency among people to dig deep pit. Almost all of the interviewees from Kerala admitted that they use deep pit (mostly unlined) due to the apprehension that a shallow pit may get filled quickly. This may cause faecal contamination of groundwater sources in the area.⁵ Similar responses were seen in Rajasthan also where a large number of toilets were not in use because people thought the shallow pits were insufficient. Thus, the presence of such toilets may ensure dignity and privacy to individuals, but they are not so different from open defecation in terms of their adverse environmental implications.

The toilets which are connected to septic tanks also pose risks to the quality of the environment. People usually understand septic tank as a storage system and therefore, build oversized tanks to avoid having to clean it or empty it periodically. This is also linked to the absence of, or inadequate, mechanism such as insufficient suction emptier trucks, trained human resources and safety equipments to facilitate the regular cleaning or emptying of septic tanks.⁶ Ideally, septic tanks are to be desludged once in every two to three years, or when the tank becomes one-third full.⁷ However, this hardly happens in real practice. Septic tanks are quite often cleaned or emptied when they are full or leaking. Moreover, there is hardly any mechanism available to empty and dispose of the septage in an environmental friendly manner. This paves way for the entry of several private

⁴ Ministry of Urban Development, Advisory Note: Septage Management in Urban India (Ministry of Urban Development 2013).

⁵ PU Megha et al, 'Sanitation Mapping of Groundwater Contamination in a Rural Village of India' (2015) 6 Journal of Environmental Protection 34.

⁶ World Bank, 'Environmental and Social Systems Assessment: Swachh Bharat Mission-Gramin' (World Bank 2015).

⁷ Ministry of Urban Development (n 4) 17.

enterprises to this field and they dispose the septage clandestinely, including into water bodies.⁸

The lack of mechanism for the safe disposal of septage is a serious environmental issue in places where toilets are connected to a septic tank. This is mainly because most of the septage is discharged into the open land, drains or fresh water bodies.⁹ For instance, private parties have been allegedly carrying out the activity of emptying septic tanks in Delhi and disposing of the septage to the nearby drainage although there are sewage treatment plants available or in existence in Delhi.¹⁰ Similarly, septage has become a serious issue in the state of Kerala where an overwhelming majority of the population in rural and urban areas has been using toilet for at least more than a decade.

Septage from on-site sanitation is worse than open defecation from an environmental and public health perspective as it carries higher level of pathogens and micro-organisms.¹¹ The clandestine disposal of untreated septage by private tankers in various isolated places including into freshwater bodies has even led to a public interest litigation being filed in the High Court of Kerala.¹² The case has led to the adoption of a specific policy on septage management by the Government of Kerala¹³ and the first septage treatment plant has started functioning in Ernakulam district.

⁸ SK Rohilla et al, 'Urban Shit: Where does it All Go?' *Down to Earth* (1-15 April 2016) <www.downtoearth.org.in/coverage/urban-shit-53422>; B Harris-White, 'The Politics of Waste Management' *The Hindu* (7 October 2015) <www.thehindu.com/opinion/lead/the-politics-of-waste-management/article7731264.ece>.

⁹ Ministry of Urban Development (n 4) 12. An empirical study conducted in a few towns in the state of Tamil Nadu has also confirmed that the common practice followed by ULBs and private parties is to dispose the untreated septage in open land, agricultural land and freshwater bodies. See Water Aid, *An Assessment of Faecal Sludge Management Policies and Programmes at the National and Select States Level* (Water Aid 2016) 98, 104.

¹⁰ Rohilla et al (n 8).

¹¹ Water Aid (n 9) 33.

¹² *R Sudha v Union of India and Ors* Writ Petition (Civil) No 34496 of 2009, Order of 10 March 2011 (High Court of Kerala); *State of Kerala v R Sudha* Special Leave Petition No 30493 of 2011, Order of 16 July 2013 (Supreme Court of India).

¹³ Government of Kerala, Circular on Solid and Liquid Waste Management, Local Self Government Department Circular No 19254/DC1/2015/LSGD (22 May 2015).

In some cases, particularly in urban areas, toilets are neither connected to a sewerage system nor to an on-site mechanism such as pits or septic tanks.¹⁴ As a result, human excreta is exposed directly to the environment. For instance, the storm water drainage system is used for disposal of wastewater including human excreta in areas where sewer lines are absent.¹⁵ Similarly, in some places, there are toilets with just super structures on an elevated platform over freshwater bodies as noticed in Vypeen block in Ernakulam district of Kerala. These toilets dispose human excreta directly to freshwater sources and cause faecal contamination of water.

While human excreta is a threat to the quality of the environment, sanitation interventions (mainly toilets) to deal with the issue of human excreta are also a threat to the environment. Improper management of human excreta is an important factor affecting the quality of water in India. It also causes a host of diseases including diarrhoea and environmental degradation.¹⁶ Nevertheless, the Union Government and state governments have been heedlessly promoting the construction of toilet across the country without due regard to its environmental implications. As a result, environmental pollution due to the disposal of untreated faecal sludge¹⁷ may become rampant across the country with the increase in the use of toilets as envisaged by the SBM.

2) Discharge of untreated wastewater

The disposal of untreated or inadequately treated wastewater¹⁸ has been identified as an important source of pollution of water and soil.¹⁹ The magnitude of the

¹⁴ Rohilla et al (n 8).

¹⁵ A Zimmer, 'The Need for An Integrated View on Urban Waste Water: A Case Study of Delhi' South Asia Network on Dams, Rivers and People (April 2012).

¹⁶ Ministry of Urban Development, Draft National Urban Faecal Sludge and Septage Management (FSSM) Policy (Ministry of Urban Development 2017) 5; George notes that the number of infections that feces can transmit is fifty. See R George, *The Big Necessity: The Unmentionable World of Human Waste and Why It Matters* (Metropolitan Books 2008) 175.

¹⁷ Faecal Sludge: "Faecal Sludge" is raw or partially digested, in a slurry or semisolid form, the collection, storage or treatment of combinations of excreta and black water, with or without grey water. It is the solid or settled contents of pit latrines and septic tanks. See Ministry of Urban Development (n 16).

¹⁸ Wastewater is regarded as a combination of one or more of: domestic effluent consisting of blackwater (excreta, urine and faecal sludge) and greywater (used water from washing and

wastewater issue in India is that a significant volume of untreated wastewater is being discharged into freshwater bodies leading to water pollution.²⁰ Discharge of untreated sewage into freshwater sources has been identified as responsible for polluting about three-fourth of surface water sources.²¹ It negatively affects a number of human rights such as the rights to health, water, environment, and livelihood.²²

Wastewater is an important sanitation-related challenge in both rural and urban areas in India. A mechanism for treating and disposing wastewater does not exist in most of the rural areas. For instance, in rural Uttar Pradesh and rural Rajasthan, wastewater is either accumulated in one or more than one places in the vicinity of the village or it is discharged into a nearby pond which is used by the villagers for domestic and livestock purposes. In some cases, wastewater gets accumulated in the close proximity of drinking water sources (for instance hand pumps), which raises the issue of likelihood of water pollution. In rural Kerala, different households follow different methods for discharging wastewater depending upon their class and availability of land. In cases where land is available, wastewater (greywater) is used to feed trees and in cases where land is insufficient (mostly in peri-urban areas), wastewater is diverted to a separate unlined tank which would let the water eventually seep into the ground. In both the cases, there is a risk of groundwater pollution. Thus, the absence of a mechanism to treat and dispose of wastewater poses threat to the quality of the environment, particularly the quality of freshwater.

In urban areas, particularly in big cities, the mechanism to dispose wastewater is comparatively better than that in rural areas. There are sewerage network and sewage treatment plants covering at least certain part of the cities. However, this

bathing); water from commercial establishments and institutions, including hospitals; industrial effluent, storm water and other urban runoff; and agricultural, horticultural and aquaculture runoff. See UN Water (n 1) 17.

¹⁹ *ibid* 40.

²⁰ CPCB, Performance Evaluation of Sewage Treatment Plants under NRCD (CPCB 2013) 2–8.

²¹ Ministry of Urban Development (n 4).

²² A Zimmer et al, 'Governing Wastewater, Curbing Pollution, and Improving Water Quality for the Realization of Human Rights' (2014) 33(4) *Waterlines* 337, 340.

is far from adequate. An estimate by the CPCB reveals that while the metropolitan cities (population above 10 Lakhs) have the capacity to treat 51 per cent of the total sewage, the capacity of class-I cities (population above 1 Lakh) is 32 per cent. Class-II (population less than 1 Lakh) cities have the capacity to treat only eight per cent of the total sewage generated.²³ The overall sewage treatment capacity is only about 20 per cent of the total sewage generated.²⁴ Thus, even in cases where toilets are connected to a sewerage network, it is unlikely that all the sewage entering into the sewerage network is treated before their disposal.

The absence of a sewerage network and sewage treatment plants is not an uncommon situation, particularly in small and medium towns. This leads to the disposal of human excreta directly to the environment.²⁵ For instance, the officials at the district level in Kannur district of Kerala admitted that there is no sewerage system in the city and wastewater is being discharged into a nearby river and the sea. Mechanism for managing wastewater is almost completely absent in the towns visited during the fieldwork in Rajasthan and Uttar Pradesh. Thus, it is not surprising to see that untreated wastewater from urban areas is a major reason for organic and bacterial contamination of freshwater in India.²⁶ For instance, the Delhi stretch of the river Yamuna is polluted by the discharge of untreated or partially treated wastewater from Delhi and the river leaves the city of Delhi almost like a sewage canal.²⁷

One of the reasons for the wastewater crisis is the way wastewater is perceived. The word ‘waste’ in the term ‘wastewater’ is probably a misleading word. In fact, wastewater is a resource because a majority of the wastewater generated, particularly the domestic wastewater, could be utilised for various purposes after treatment. Wastewater, if treated properly, has a great potential to address water

²³ CPCB (n 20) 2–8.

²⁴ Ministry of Urban Development, Strategic Plan of Ministry of Urban Development for 2011–2016. Another report by the CPCB estimates that the municipal wastewater treatment capacity developed so far in India accounts for only about 29 per cent of the total wastewater generated, see CPCB, Status of Water Quality in India 2011 (CPCB 2013) 5.

²⁵ Rohilla et al (n 8).

²⁶ CPCB (n 24) 28.

²⁷ S Banerjee and J Chaudhuri, Excreta Matters: State of India Environment—Citizens’ Report 2012 (Centre for Science and Environment 2012) 96.

scarcity issues particularly in the arid and semi-arid areas.²⁸ One of the by-products of wastewater treatment is sewage sludge and it has a potential to be used as a soil conditioner and a fertilizer.²⁹ Thus, a mechanism to treat wastewater to facilitate its reuse could not only contribute to the realisation of the right to environment but also to enhance the food security and livelihood opportunities to farmers who use the treated wastewater for irrigation.³⁰

The negative impacts of wastewater as well as its potential to address water scarcity through recycling and reuse have received significant attention recently at the international level. Thus, the SDGs have set the target of halving the proportion of untreated wastewater by 2030 (Goal 6.3). It also underlines the need for a substantial increase in recycling and safe reuse of wastewater. This is indeed a significant step ahead when compared to the silence of MDGs on this issue. The increasing attention given to issues in the context of wastewater is further clear from the fact that the latest World Water Development Report focuses on wastewater.³¹

B. SOLID WASTE MANAGEMENT AND RISK FOR THE ENVIRONMENT

Improper or inadequate mechanism for solid waste management is an important sanitation related challenge with significant impact on the quality of air, water and land.³² Environmental pollution due to improper disposal of solid waste is to the

²⁸ UN Water (n 1) 74.

²⁹ *ibid* 44.

³⁰ *ibid* 5. See also S Sengupta, 'Is Sewage Farming Safe?' *Down to Earth* (28 February 2015) <www.downtoearth.org.in/coverage/is-sewage-farming-safe-48566>. In fact, farmers in urban and peri-urban areas in India have been using wastewater (both treated and untreated) for agriculture albeit with risks for the public health and environment. The risk for public health due to the use of untreated or partially treated wastewater for agriculture has been a contentious issue in some cases and led the NGT to ban such agriculture. See eg *Manoj Misra v Union of India* Original Application No 6 of 2012, Judgement of 13 January 2015 (NGT—Principal Bench).

³¹ UN Water (n 1).

³² Centre for Science and Environment, 'Not in My Backyard: Solid Waste Management in Indian Cities' (Centre for Science and Environment 2016); M Joshi & M Sharma, 'Landfills or Pollution Bombs? Delhi's Garbage Dumps Spewing Toxic Gases' *Hindustan Times* (5 May 2016) <www.hindustantimes.com/delhi-news/landfill-sites-or-pollution-bombs-garbage-dumps-spewing-toxic-gases/story-2abfwizFWqY5NzsFzbuFdN.ht>.

extent that it has even led to public protest and litigations in many places in the country.³³ Thus, the issues related to the management of solid waste is relevant in the context of the both the rights to sanitation and environment.

The lack of, or inadequate, mechanism for solid waste management is a challenge both in rural and urban areas although the issue is comparatively more serious in urban areas. According to a Report by the Planning Commission of India³⁴, urban areas in India generate 62 million tons of solid waste per annum.³⁵ The Report further projects that by 2031, it will be 165 million tons of waste annually.³⁶ Another study observes that ‘urban India generates 42 million tonnes of solid waste annually, or 115,000 tonnes a day—between 0.2 and 0.6 kilograms per person each day’.³⁷

The existing mechanism to address this issue is both improper and inadequate and consequently poses serious environment (and public health) risks not only for urban residents but for rural population as well. Landfills are the most common system followed by ULBs. In some cases, solid wastes are generally dumped in landfills and in some other cases they are just spread in landfills without compaction.³⁸ Several cities are already functioning with a managing capacity which is way below their actual need. For instance, in 2014, Delhi required 650

³³ eg A Pallavi, ‘Mavallipura Village Resists Attempts of Bengaluru Municipal Corporation to Restart Closed Landfill’ *Down to Earth* (28 August 2012) <www.downtoearth.org.in/news/mavallipura-village-resists-attempts-of-bengaluru-municipal-corporation-to-restart-closed-landfill-38964>.

³⁴ The Planning Commission of India was a body of the Government of India, set up by a Resolution of the Government of India in March 1950. Its key functions included an assessment of the material, capital and human resources of the country, investigation of the possibilities of augmenting the resources and formulation of a Plan for the most effective and balanced utilisation of country’s resources. On 1 January 2015, through a resolution by the Government of India, the Planning Commission of India is replaced by a new institution, namely, the NITI Aayog (National Institution for Transforming India).

³⁵ Planning Commission of India, Report of the Task Force on Waste to Energy Vol 1 (Planning Commission of India 2014) ii.

³⁶ *ibid.*

³⁷ N Gupta and R Gupta, ‘Solid Waste Management and Sustainable Cities in India: The Case of Chandigarh’ (2015) 27(2) *Environment and Urbanization* 573. See also RK Annepu, *Sustainable Solid Waste Management in India* (Masters Dissertation, unpublished, Columbia University, New York 2012).

³⁸ K Paul, ‘A Comprehensive Study on Landfill Site Selection for Kolkata City, India’ (2014) 64(7) *India Journal of the Air and Waste Management Association* 846.

acres of land to address its solid waste issue, whereas it was managing with a total of 164 acres that too had crossed its capacity.³⁹ However, according to an observation by the NGT, these estimates are far from being accurate and the real situation could be worse than what is stated in different reports.⁴⁰

The lack of mechanism to manage solid wastes and the consequent environmental pollution disproportionately affects the poor and the marginalised. For instance, one of the landfills in Delhi is situated in Bhalswa, a place where resettlement colonies for people displaced from different slums in Delhi were set up. Around 4000 households are living in Bhalswa resettlement colony. The landfill is still functioning even though it has already reached about 22m of height, and it was supposed to be closed in 2009.⁴¹ In addition to the issues like constant foul smell and occasional fire, contamination of groundwater due to leachate from the landfill is a serious issue especially because groundwater is one of the main sources of drinking water for the residents in the area due to inadequate water supply provided by the government.⁴²

The Vilappilshala dispute in Kerala further illustrates the issue of environmental pollution due to solid waste management mechanisms such as landfills. In 2000, the Thiruvananthapuram Corporation in Kerala purchased a land (46.5 acres) in Vilappilshala to set up a facility for municipal solid waste management. The people in the village began facing environmental issues ever since the first set of

³⁹ D Nath, 'Garbage Issue Raises a Big Stink' *The Hindu* (25 May 2014) <www.thehindu.com/news/cities/Delhi/garbage-issue-raises-a-big-stink/article6046011.ece>.

⁴⁰ The NGT observed that: 'It was fairly conceded before us during the course of the hearing that none of the Corporations have ever physically verified the quantum and/or quality of the waste generated in any district of any State much less for the entire State. They have proceeded with a presumptive figure that per-capita generation of MSW is nearly 450 grams per day in major towns while per capita MSW generated from small towns is 200-300 grams per day'. See *Almitra Patel v Union of India* Original Application No. 199 of 2014, Judgment of 22 December 2016, 39 (NGT—Principal Bench).

⁴¹ Bhalswa Lok Shakti Manch and Hazards Centre, Ground Water Quality and Health Impacts in Bhalswa, New Delhi—A Report (Bhalswa Lok Shakti Manch and Hazards Centre 2012).

⁴² *ibid.* See also SK Singh and B Jhamnani, 'Groundwater Contamination due to Bhalswa Landfill Site in New Delhi' (2009) 1(3) *International Journal of Civil and Environmental Engineering* 121; M Joshi, 'Fires at Bhalswa Landfill: Recommendations to Control Fires at Landfills not being Followed' *The Indian Express* (Delhi 12 October 2016) 3.

truckloads of waste arrived in the village,⁴³ which eventually led to public protest and a public interest litigation being filed in the High Court of Kerala.⁴⁴

Solid waste management is an issue in rural areas as well although the nature and magnitude may not be as serious as in urban areas. This is probably because solid waste generated in rural areas is mostly organic and bio-degradable and as a result it has not yet become a serious issue when compared to the solid waste issue in the urban sanitation context.⁴⁵ Though the nature of waste generated in rural areas is predominantly organic and biodegradable it poses risk to the quality of the environment. An estimate shows that rural people in India generate 0.3 to 0.4 million metric tons of solid waste (organic/recyclable) per day.⁴⁶ In the absence of any mechanism for solid waste management, burning, burying or open dumping seem to be the common practice. This may affect the realisation of the rights to sanitation and environment.

The environmental issues arising in the context of the management of used sanitary napkins presents the case of environmental implications of certain sanitation interventions. The management of used sanitary napkins is progressively emerging as an issue both from the point of view of the right to sanitation and the right to environment. The production and use of sanitary napkins are being promoted by both the government and various non-governmental organisations as part of their MHM initiatives.⁴⁷ The available data

⁴³ Source: interview with Mr Subash—an activist based in Thiruvananthapuram who associated with the public protest in Vilappilshala.

⁴⁴ The High Court of Kerala transferred the case to the NGT in 2014. The NGT held that the Corporation had violated the right to live in pollution free environment of the people of Vilappilshala by dumping waste. The NGT further declared the setting up of a municipal solid waste plant by the Corporation in Vilappilsala Panchayat illegal. See *Vilappilsala Samyuktha Samara Samithi v State of Kerala* Original Application No 247 of 2014, Judgment of 30 September 2015 (NGT—Southern Bench).

⁴⁵ National Institute of Rural Development, *Solid Waste Management in Rural Areas: A Step-by-Step Guide for Gram Panchayats* (National Institute of Rural Development 2016) 7.

⁴⁶ Ministry of Drinking Water and Sanitation, *Solid and Liquid Waste Management: A Technical Note* (Ministry of Drinking Water and Sanitation 2015) 8.

⁴⁷ S Joseph, 'Why India Doesn't Need the Sanitary Napkin Revolution' *Swarajya* (19 July 2015) <<https://swarajyamag.com/culture/why-india-doesnt-need-the-sanitary-napkin-revolution>>.

shows that the use of sanitary napkins is constantly increasing.⁴⁸ However, the overwhelming focus is mainly on the promotion of the use of sanitary napkins and there is little or no focus on the management of the used sanitary napkins.

The absence of any specific mechanism for the safe disposal of used napkins leads to burying, burning or discarding of them. These disposal practices may affect the quality of the environment.⁴⁹ The material used to make plastic napkins is non-biodegradable and thus gets accumulated. Burning sanitary napkins may release harmful toxins into the atmosphere.⁵⁰ Similar issues may also arise in the context of burying, burning or open dumping of used diapers.

The lack of adequate mechanism for solid waste management is an important concern from the perspective of the rights to sanitation and environment. In addition to that, issues related to the management of used sanitary napkins reveals that certain sanitation interventions exclusively focus on access to sanitation materials and overlook the environmental pollution that may arise due to the lack of any mechanism to manage such sanitation materials after their use.

II. STATUTORY AND POLICY FRAMEWORK: ISSUES OF INADEQUACY AND NON-IMPLEMENTATION

There are a number of statutory and policy instruments that address different environmental dimensions of the right to sanitation. However, a key issue in this regard is the implementation of the existing norms and standards. In this context, this section of the chapter examines the existing statutory and policy framework

⁴⁸ Although there is no separate data on the use of disposable sanitary napkins, the existing data indicate that the use is not insignificant. A survey by the Ministry of Health and Family Welfare estimates the number of women using hygienic means of managing menstruation in India at 77.5 per cent in urban areas, 48.2 per cent in rural areas and 57.6 per cent overall. National Family Health Survey-4 2015–16: India Fact Sheet, Ministry of Health and Family Welfare <<http://rchiips.org/NFHS/pdf/NFHS4/India.pdf>>.

⁴⁹ R George, ‘The Other Side to India’s Sanitary Pad Revolution’ *The Guardian* (30 May 2016) <www.theguardian.com/commentisfree/2016/may/30/india-sanitary-pad-revolution-menstrual-man-periods-waste-problem>.

⁵⁰ M Lekhi, ‘Why We Need a Proper Menstrual Waste Disposal System’ *The Times of India* (7 August 2016) <<http://blogs.timesofindia.indiatimes.com/Chargesheet/why-we-need-a-proper-menstrual-waste-disposal-system/>>.

and analyses to what extent the existing law and policy framework is effective in terms of ensuring the realisation of both the rights to sanitation and environment.

A. FRAMEWORK ADDRESSING ENVIRONMENTAL DIMENSIONS OF THE RIGHT

1) Toilet construction and management of septage

Toilets and management of human excreta are important elements of the right to sanitation from an environmental perspective. There are mainly two aspects relevant in the context of the realisation of the rights to sanitation and environment. First, toilets, if not properly constructed, may lead to water pollution. Thus, the regulatory framework governing the construction and design of toilets is pertinent from an environmental perspective. Second, the management of septage⁵¹ is an important concern because the absence of, or inadequate, mechanism for managing septage may lead to disposal of untreated septage directly to the environment.

There are norms at multiple levels regulating the design and construction of toilets in order to prevent and control the adverse environmental implications. For instance, at the union level, the Manual on Sewerage and Sewage Treatment 2013, published by the CPHEEO, lays down the norms and standards for best practices in on-site sanitation and wastewater management.⁵² The Bureau of Indian Standards (BIS), a national standard-setting body working under the Ministry of Consumer Affairs, Food and Public Distribution of the Union Government, has formulated the standards to regulate on-site human excreta management systems.⁵³ This includes standards that cover subject matters such as construction

⁵¹ Septage means the liquid and solid material that is pumped from a septic tank, cesspool, or such onsite treatment facility after it has accumulated over a period of time. See Ministry of Urban Development (n 16) 9.

⁵² CPHEEO, Manual on Sewerage and Sewage Treatment (CPHEEO 2013).

⁵³ BIS is a body established under the Bureau of Indian Standards Act 1986 which has been repealed by the Bureau of Indian Standards Act 2016. However, the website of the Bureau of Indian Standards notes that the Bureau of Indian Standards 2016 is yet to be implemented.

of septic tanks and leaching pits, and the minimum distance to be maintained between pits and a drinking water source.⁵⁴

In addition to the norms that regulate the design and construction of toilets, there are norms and standards to regulate the management of septage. The regulatory framework in this regard include environmental laws at the national level,⁵⁵ non-binding instruments at the national level,⁵⁶ non-binding guidelines at the state level⁵⁷ and binding regulations at the city level.⁵⁸ Although the nature and scope of these instruments are different, they generally address the key elements of septage management to prevent and control adverse implications on the environment and public health. Mainly, the existing regulatory framework provides norms and standards to ensure the regulation of matters such as construction of on-site management systems, periodic removal of sludge from septic tanks, septage-related service providers, transportation of septage to treatment plants and environment friendly disposal and/or reuse of the treated septage.

It is to be noted that most of the developments related to septage management discussed above are in the urban context. The major exception to this is the environmental laws that are applicable to both rural and urban contexts. The overwhelming focus of the law and policy framework on the urban context could be attributed to the fact that the use of toilets is more prevalent in urban areas when compared to rural areas. As a result, the issues related to management of septage is more visible in urban areas. However, given the way the SBM is promoting toilet construction in rural areas, faecal sludge management is going to be an issue equally relevant in the rural context as well. In fact, septage management is already an important issue in rural areas in the state of Kerala and

⁵⁴ eg Code of Practice for Installation of Septic Tanks (BIS IS 2470: 1986); Code of Practice for Installation of Septic Tanks (BIS IS 2470:1985); Code of Practice for Sanitation with Leaching Pits for Rural Communities (BIS IS 12314:1987).

⁵⁵ eg Environment (Protection) Act 1986, Water (Prevention and Control of Pollution) Act 1974.

⁵⁶ eg Ministry of Urban Development (n 4).

⁵⁷ eg Odisha Urban Septage Management Guidelines 2016.

⁵⁸ eg Delhi Water Board Septic Tank Waste Management Regulations 2015; Bhubaneswar Septage Management Regulations 2015

it is likely to increase in a context when the state has recently been declared ODF.⁵⁹

2) Treatment, recycling and reuse of sewage

There is a complex web of statutes that regulate treatment, disposal and reuse of sewage. At the union level, the Water (Prevention and Control of Pollution) Act 1974 (Water Act) is the key statutory framework in this regard. The Water Act regulates the treatment and disposal of sewage mainly through two tools. First, it requires prior consent from the concerned SPCB to set up any mechanism for treating and disposing sewage.⁶⁰ The Water Act further empowers SPCBs to impose binding conditions regarding the composition, rate of sewage, temperature, and volume while granting consent.⁶¹ Second, the Water Act entrusts the CPCB as well as SPCBs with the power and duty to ensure the quality of water. This includes prescribing the volume and quality of sewage in terms of concentration of various pollutants,⁶² laying down economical and reliable treatment standards of sewage effluents to be discharged into a stream,⁶³ and monitoring the working of existing sewage treatment plants.⁶⁴

These two regulatory tools are relevant particularly in the context of sewage facilities which are managed by local bodies especially in the urban areas because centralised sewerage networks and sewage treatment plants are virtually absent in rural areas. However, the provisions of the Water Act are relevant in rural context as well. For instance, the Water Act does not allow anyone to let wastewater flow into and pollute any stream or well.⁶⁵ However, the effectiveness of this provision in controlling water pollution due to wastewater in rural areas is doubtful mainly because this may require constant monitoring of the actions of individuals and other actors, which may not be practically viable. In addition to environmental

⁵⁹ Ministry of Drinking Water and Sanitation, Kerala Declared Open Defecation Free (1 November 2016) <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=153172>>.

⁶⁰ Water (Prevention and Control of Pollution) Act 1974, s 25.

⁶¹ *ibid* s 25(4)(a)(iii).

⁶² *ibid* s 17(1)(g).

⁶³ *ibid* s 17(1)(k).

⁶⁴ *ibid* s 17(1)(g).

⁶⁵ *ibid* s 24(1).

laws, there are non-binding instruments laying down norms and standards on management of wastewater. For instance, the CPHEEO Manual on Sewerage and Sewage Treatment 2013 provides guidance on the technical, operational and maintenance aspects of sewage management.

The promotion of recycling and reuse of treated wastewater for non-potable purposes such as irrigation is yet another progressive approach to address the issue of wastewater. On the one hand, recycling and reuse of wastewater reduces the extent of water pollution and on the other, it promotes the use of treated wastewater for non-potable purposes such as irrigation, gardening and construction work. The idea of recycling and reuse of wastewater has progressively received law and policy attention.

At the national level, the Water Act imposes a duty on SPCBs to evolve methods of utilisation of sewage in agriculture.⁶⁶ It is also a duty of the Water Quality Assessment Authority to direct different agencies and organisations including local bodies to promote recycling and reuse of treated sewage for irrigation.⁶⁷ Beyond this, certain ULBs and state governments have adopted specific legal instruments for this purpose.⁶⁸ Under these legal instruments, it is mandatory for large housing complexes, commercial and industrial premises to have mechanisms for recycling and reuse of greywater. Certain states have included provisions on recycling and reuse of wastewater as part of their building regulations. For instance, the Meghalaya Building Bye Laws 2011 provides that it is mandatory for all building with a minimum covered area of 500m² or minimum discharge of 10,000 litres per day to incorporate a system for recycling of wastewater.⁶⁹ It also requires group housing schemes to design sewerage system for reuse of water.⁷⁰

⁶⁶ *ibid* 17(1)(i).

⁶⁷ Water Quality Assessment Authority Order 2011, 2(II)(d).

⁶⁸ eg Gujarat Regulations for the Reuse of Water 2012; Madhya Pradesh Municipal Corporation (Recycled and Reuse of Grey Water in Buildings) Model Byelaws 2010.

⁶⁹ Meghalaya Building Bye Laws 2011, s 83.

⁷⁰ *ibid* s 68(6).

At the policy level, the National Water Policies have been promoting the idea of recycling and reuse of wastewater since the adoption of the first policy in 1987.⁷¹ Recycling and reuse of wastewater is being promoted through developmental programmes as well. For instance, the recycling and reuse of wastewater is one of the components under the Atal Mission for Rejuvenation and Urban Transformation.⁷² Although this idea has been promoted through various law and policy instruments at different levels (central to city level), it is yet to be implemented at a wider scale particularly in rural areas.

3) Solid waste management

Management of solid waste is one of the components of the rights to sanitation and environment.⁷³ As a result, the statutory framework regulating the management of solid waste forms an important part of the statutory framework related to the realisation of both the rights. Solid waste management is an aspect of the right to sanitation and the right to environment that has received significant legal attention. Management of solid waste has been an important focus of environmental law in India at least since the adoption of the Environment (Protection) Act 1986. Over the years, a number of Rules have been adopted under the Environment (Protection) Act 1986 to ensure environmentally sound management of different categories of waste.⁷⁴

A common feature of the Rules adopted under the Environment (Protection) Act 1986 is that they define the responsibilities of key actors such as waste generators,

⁷¹ National Water Policy 1987, para 3.5; National Water Policy 2002, para 16.2; National Water Policy 2012, para 6.3.

⁷² Atal Mission for Rejuvenation and Urban Transformation Guidelines 2015, para 3.1.2.

⁷³ The process of solid waste management mainly includes the collection, storage, transportation reduction, re-use, recovery, recycling, composting or disposal in an environmentally safe manner [See Plastic Waste Rules 2016, r 3(z)]. The term ‘environmentally sound management’ of waste indicates taking all steps required to ensure that the hazardous and other wastes are managed in a manner which shall protect health and the environment against the adverse effects which may result from such waste [See Hazardous and Other Wastes (Management and Transboundary Movement) Rules 2016, r 3(13)].

⁷⁴ Solid Waste Management Rules 2016; E-Waste (Management) Rules 2016; Plastic Waste Management Rules 2016; Bio-Medical Waste Management Rules 2016. It is to be noted that many of the Rules mentioned here were adopted since mid-1980s and their modified versions were adopted in 2016. Original documents of the revised versions can be accessed from <<http://envfor.nic.in/sites/default/files/Waste%20Management%20Rules,%202016.pdf>>.

state governments, local bodies and SPCBs. For instance, the Solid Waste Management Rules 2016 lay down the duties and functions of individuals and other waste generators, ULBs and SPCBs so as to ensure minimal impact of municipal solid waste on environment. It is the duty of the waste generators to segregate the bio-degradable, non-bio-degradable and domestic hazardous wastes and handover them to authorised waste pickers.⁷⁵ Similarly, the duties and functions of all related ministries and agencies at the union and state level have also been laid down.⁷⁶ It is also mandatory for the operator of solid waste facilities to get approval from the concerned SPCB.⁷⁷ A Similar approach has been adopted in the Rules adopted for the management of other categories of waste as well.⁷⁸

The Solid Waste Management Rules 2016 provides a more specific intersection between environment and sanitation from the point of view of realisation of both the rights to sanitation and environment. It acknowledges the environmental issues caused by the disposal of used sanitary napkins and diapers. It is a duty of users to wrap securely the used sanitary waste like diapers and sanitary pads in the pouches provided by the manufacturers or in a suitable wrapping material as instructed by the local authorities.⁷⁹ Further, users are duty bound to place the same in the bin meant for dry waste or non- bio-degradable waste.⁸⁰ While this is an important step, it falls short of creating any clear legal responsibility for manufacturers to provide a wrapping material along with their product or to take initiatives individually or collectively to collect the used products for recycling purposes. Manufacturers are supposed to only ‘explore’ the possibility of using all recyclable materials in their products.⁸¹

⁷⁵ Solid Waste Management Rules 2016, r 4(a).

⁷⁶ *ibid* r 4–18.

⁷⁷ *ibid* r 19(3).

⁷⁸ eg Plastic Waste Management Rules 2016 and Bio-Medical Waste Management Rules 2016.

⁷⁹ Solid Waste Management Rules 2016, r 4(1)(b).

⁸⁰ *ibid*.

⁸¹ *ibid* r 17(1)(3).

B. GAP BETWEEN THE LEGAL FRAMEWORK AND IMPLEMENTATION

It is clear from the section above that there is a regulatory framework addressing environmental dimensions of the right to sanitation. A proper implementation of this framework is expected to lead to the realisation of the rights to sanitation and environment. However, in reality, environmental pollution due to lack of sanitation as well as sanitation interventions such as toilets continue to be a serious issue. In this context, it is pertinent to raise the question why, and how, the existing laws, standards and guidelines as discussed above have failed to address the environmental dimensions of sanitation. The issue at hand is complex and multifaceted. Mainly there could be three explanations for this scenario which may be explained as follows:

1) Disconnect between sanitation interventions and the regulatory framework

A majority of the statutes and policies addressing environmental dimensions of the right to sanitation are viewed by agencies implementing sanitation interventions as environmental laws. This compartmentalisation led to a serious disconnect between implementation of sanitation interventions and the regulatory framework explained above in this section. At the implementation level, agencies implementing sanitation interventions hardly take into consideration the laws as well as other norms and standards relevant in the context of environmental dimensions of the right to sanitation. In fact, agencies implementing sanitation interventions follow only the guidelines issued under the policy framework such as the guidelines issued under the SBM and ignore norms on environmental issues such as the norms on the issue of depth of toilet pits or the management of septage, although there are specific and elaborate norms on these subject-matters.

This reveals the narrow understanding of the agencies implementing sanitation interventions that is limited to ensure access to toilets. Thus, sanitation interventions focus almost exclusively on toilets and even in the case of toilets the major focus is the issue of privacy, security and dignity of individuals while they defecate and urinate. Put it differently, while sanitation interventions focus on

privacy, security and dignity of individuals in the context of defecation and urination, it undermines the impact of sanitation on the realisation of the right to environment.

2) Indeterminate and non-binding nature

Several of the statutory provisions are ‘weak’ provisions in terms of their construction and enforceability. For instance, responsibilities of ULBs are generally constructed in a conditional language in the statutes governing them. A standard formulation in many of these laws is ‘subject to availability of funds’.⁸² The conditional language of statutory provisions coupled with their vagueness often result in non-performance of functions and duties although lack of money cannot be a reason for not carrying out legal responsibilities relating to sanitation as per the Supreme Court of India’s decision in *Ratlam Municipality*. The Supreme Court of India in *Ratlam Municipality* categorially held that ‘a responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability’.⁸³

The ‘weakness’ is not just about the conditional language used in statutes. A number of regulatory instruments mentioned above are not legally binding instruments, for instance BIS Standards. They are voluntary in nature. This could be reason why implementing agencies generally ignore these norms. This is, for instance, the case where regardless of specific norms on construction and design of septic tanks and pits, these are influenced largely by the local construction practices, availability of materials and the skill of masons as noticed during fieldwork in Rajasthan and Kerala.

⁸² L Bhullar, ‘Ensuring Safe Municipal Wastewater Disposal in Urban India: Is There a Legal Basis?’ (2013) 25(2) Journal of Environmental Law 235.

⁸³ *Municipal Council, Ratlam v Vardhichand* (1980) 4 SCC 162, 171 (Supreme Court of India).

3) Inadequate implementation of environmental laws

While agencies in the sanitation sector has shown disregard for the regulatory framework addressing environmental dimensions of the right to sanitation, agencies that are primarily responsible for implementing environmental laws have also shown a high level of disregard for the rules and standards laid down in the existing law and policy framework. A large of number of cases filed before the higher judiciary in the last couple of decades on various environmental aspects of sanitation highlight the issue of non-compliance. Predominantly, the cases were in the form of public interest litigation seeking direction from the court to the state government and local bodies (most of the cases are in the urban context) to take appropriate actions to address the environmental pollution due to disposal of untreated or partially treated wastewater.⁸⁴ In a majority of these cases, the higher judiciary has been unequivocal in highlighting the duty of the government and local bodies emanating from statutes (laws governing local bodies in rural and urban areas) and the Constitution of India, most importantly the fundamental right to life under article 21 of the Constitution of India.

While the case law are indicative of the use of law and the language of rights by individuals and organisations, they also expose the issue of rampant non-compliance with, and disrespect for, environmental laws and standards. The history of the *Almitra Patel* case is an example to illustrate the magnitude of the issue of non-compliance among other things.

The instant case was filed in 1996 before the Supreme Court of India as a public interest litigation on the issue of municipal solid waste disposal. The Supreme Court of India had interfered on the issue till 2014 and then transferred the case to the NGT. The implications of the case have been mixed. On the positive side, the case led to the adoption of the Municipal Solid Waste (Management and

⁸⁴ eg *MC Mehta v Union of India* 1992 Supp (2) SCC 637 (Supreme Court of India); *KK Residents Association v Paravur Municipality and Others* Writ Petition (Civil) No 36913 of 2009, Judgment of 22 February 2010 (High Court of Kerala). Similar issues came up before the NGT also on several occasions. See eg *Manoj Misra* (n 30).

Handling) Rules 2000.⁸⁵ On the negative side, the Supreme Court of India went heavily on the urban poor residing in slums and stated that ‘[I]t is the garbage and solid waste generated by these slums which require to be dealt with most expeditiously and on the basis of priority’.⁸⁶ While it is a good move to improve sanitation conditions in slums, the Court criticised the local bodies in Delhi for not taking actions in preventing the slums coming into existence. The Court seems to have intended slum clearance as a solution to address the environmental pollution due to solid waste in Delhi rather than improving living conditions in slums. The approach of the Court is clear when it stated that ‘rewarding an encroacher on public land with free alternate site is like giving a reward to a pickpocket’.⁸⁷ This approach of the Court led to the eviction of slum dwellers.⁸⁸

The interference of the Supreme Court of India through *Almitra Patel* and other cases⁸⁹ has not improved the solid waste management scenario in India mainly because the orders of the court were not complied with properly. Thus, while disposing the *Almitra Patel* case, the NGT observed that:

Upon analysis of the above status reports, affidavits and documents placed on record, one fact that becomes more that evident is that all the States are at a planning stage and execution is lacking at all relevant stages, whether it is the beautiful city like Chandigarh or nature’s gift to earth-city like Srinagar or be it the capital of our country, nowhere the generated MSW is adequately and appropriately collected, segregated, transported and disposed off in accordance with Rules in force, at all the relevant times’.⁹⁰

⁸⁵ The Solid Waste Management Rules 2000 was based on the report of a committee appointed by the Supreme Court of India. For details see A Patel, Successes and Failures of WP (C) 888/96 on Solid Waste Management (29 April 2006) <www.almitrapatel.com/pilonswm.htm>. See also *Almitra Patel v Union of India*, Writ Petition (Civil) No 888 of 1996, Order of 11 January 2000 (Supreme Court of India), wherein the Union Government gave an assurance in the Court that the Management of Municipal Solid Waste (Management and Handling Rules 1999) will be notified shortly.

⁸⁶ *Almitra Patel v Union of India* (2000) 2 SCC 679, 685 (Supreme Court of India).

⁸⁷ *ibid.*

⁸⁸ The notion of a clean city for the urban middle and upper class has led to the eviction and displacement of the urban poor on many occasions. The judiciary in India has quite often played an instrumental role in bringing illegality to the life of a large number of urban poor. For a detailed discussion, see G Bhan, ‘This is No Longer the City I Once Knew’. Evictions, the Urban Poor and the Right to the City in Millennial Delhi’ (2009) 21(1) Environment and Urbanization 127; U Ramanathan, ‘Illegality and the Urban Poor’ (2006) 41(29) Economic and Political Weekly 3193.

⁸⁹ eg *Dr BL Wadehra v Union of India* (1996) 2 SCC 594 (Supreme Court of India).

⁹⁰ *Almitra Patel v Union of India* Original Application No 199 of 2014, Judgment of 22 December 2016, para 12 (NGT—Principal Bench).

Undoubtedly, the non-compliance with the laws and court orders have affected the realisation of the rights to sanitation and environment. Thus, a proper co-ordination between the implementation of sanitation interventions and the regulatory framework addressing different environmental dimensions of the right to sanitation seems necessary. Further, the agencies implementing sanitation interventions are to be made aware of all the applicable norms and standards. The policy framework is probably better placed to address this issue by designing awareness creation programmes for implementing agencies as part of its general IEC activities. The existing approach that views the current sanitation framework as a self-contained framework seems counter-productive for the realisation of the rights to sanitation and environment.

III. TOWARDS CO-REALISATION OF THE RIGHTS TO SANITATION AND ENVIRONMENT

There are multiple environmental dimensions to the right to sanitation. On the one hand, lack of adequate sanitation facilities is an important reason for environmental pollution in India. This is, for instance, illustrated in the case of water pollution due to open defecation and disposal of untreated or partially treated wastewater. On the other hand, certain sanitation interventions may also lead to environmental pollution. This aspect, for instance, is clear from the case of water pollution due to unlined pits of toilets. Both the issues hinder the realisation of not just the right to sanitation but the right to environment also. Thus, addressing the environmental dimensions of the right to sanitation is crucial for the realisation of the rights to sanitation and environment.

Environmental dimensions of the right to sanitation are regulated through different legal instruments with varying nature, scope and application. First, the nature of different regulatory instruments is different. While some of them are legally binding, for instance the Water Act and the Environment (Protection) Act 1986; some others are not legally binding as is the case of instruments adopted by the BIS. Second, the jurisdictional scope of different legal instruments is different, ranging from city level to the national level. Third, different instruments address different issues. For instance, while the technical aspects of toilet construction

such as the number of pits and the distance between a toilet and a water supply source are addressed in instruments adopted by the BIS, the issue of septage management is specifically addressed in city level regulations. Thus, the statutory framework addressing environmental dimensions of the right to sanitation is fragmented and complex in nature and scope.

The policy framework has also included the environmental dimensions of the sanitation. The concept of sanitation is defined in the policy framework in a broad manner to include environmental dimensions among other things.⁹¹ The focus on the environmental dimensions of sanitation has been progressively expanded over the years. For instance, a recent document on faecal sludge management in urban areas uses the term ‘safe and sustainable sanitation’.⁹² Sanitation is understood broadly to include not just the right of individuals to access to toilets but the right to be protected against environmental pollution. Thus, the protection of environment, for example by promoting the treatment, recycling and reusing of solid and liquid waste, constitute an important aspect of the right to sanitation. It indicates that the policy framework for sanitation promotes a broad understanding of sanitation that takes into consideration the link between sanitation and the realisation of the right to environment.

However, the existing rules and guidelines have not been adequately implemented. This is partly because some of the rules and standards are not legally binding in nature and therefore implementing agencies have not taken them seriously, and partly because the fragmented nature of the existing statutory and policy framework makes it difficult for implementing agencies to be aware of them and apply them. In addition to that, the compartmentalisation at the institutional level and the lack of coordination between relevant institutions are also key reasons for the lack of adequate implementation of the statutory and policy framework addressing environmental dimensions of the right to sanitation. For instance, fieldwork conducted in three states has revealed that there is little or no coordination between different institutions such as the agencies implementing

⁹¹ eg National Urban Sanitation Policy 2008, background.

⁹² Ministry of Urban Development (n 16).

sanitation interventions, agencies implementing water supply schemes, SPCBs and local bodies.⁹³ Thus, even though there are a number of institutions duty bound to address environmental dimensions of the right to sanitation, the presence of multiple institutions and the consequent institutional inertia have apparently led to inactions or improper responses to many of these issues.

The vigour in which the sanitation interventions have been implemented in India since the adoption of the SBM in 2014 present an opportunity to address many of these issues. In fact, the SBM could contribute significantly to the co-realisation of the rights to sanitation and environment by integrating the relevant rules of environmental law and standards as discussed above in this chapter into the policy framework. Three factors are important in this regard.

First, agencies implementing various sanitation interventions are to be made aware of the relevant rules and standards addressing environmental dimensions of the right to sanitation. Given the fact that implementing agencies at the local level are blindly following the guidelines adopted at the union level, integration of these guidelines with other relevant rules and standards in the environmental context may well be organised at that level. A mere knowledge dissemination exercise is not enough in a context where capacity at the local level is also an obstacle. Thus, adequate effort is also needed to ensure that appropriate technology and human resources are available at the local level to properly implement the existing rules and standards. For instance, one of the major reasons why toilets are being constructed in an unscientific manner is the lack of availability of trained masons to construct toilets.

Second, the co-realisation of the rights to sanitation and environment requires an understanding that sanitation is inherently a multifaceted issue and therefore, the solution requires a proper coordination of all the relevant frameworks. Thus, the coordination between agencies implementing sanitation interventions and the institutions created under environmental laws, for instance the SPCBs, is absolutely necessary. For instance, the issue of septage crisis requires

⁹³ A study on Delhi has also identified similar issues, see Zimmer (n 15) 2.

coordination between local bodies and the concerned SPCB. While the local bodies are responsible to make available the facilities for environment friendly management of septage, SPCBs are entrusted with the duty to monitor, under the Environment (Protection) Act 1986, the entire process from collection to disposal.

Third, while implementing agencies must comply with relevant rules and standards, they also need to enforce the applicable laws. Some of the rules and standards are addressed to individuals. For instance, individuals, while constructing toilets, are supposed to follow the relevant rules and standards, for instance the minimum distance to be maintained between a toilet and a drinking water source. While implementing agencies need to make available the required technology and human capacity, the concerned individuals must not be allowed to contravene the rules and standards. Similarly, the Solid Waste Rules 2016 require individuals to segregate domestic wastes. Rules like these are to be enforced provided adequate supporting mechanisms are made available by the implementing agencies. This is particularly relevant in a context where non-compliance by individuals is also an important reason for environmental pollution. For instance, there has not been any effort to prevent people from constructing deep pits to avoid having to empty it or clean it at regular intervals.

SUMMARY

Prevention and control of environmental pollution is an important element of the right to sanitation and thus, an important objective of sanitation interventions. The realisation of the rights to sanitation and environment will be incomplete in a context where environmental pollution due to waste including human excreta is prevalent. The environmental dimensions of the right to sanitation is relevant to the realisation of the right to environment as well because environmental pollution due to lack of sanitation as well as due to certain sanitation interventions adversely affects the realisation of the right to environment. Thus, environmental aspects of sanitation constitute an important intersection of issues to be addressed for the realisation of the rights to sanitation and environment.

Despite the importance of sanitation interventions for the realisation of the rights to sanitation and environment, sanitation interventions in India have consistently undermined the link between sanitation and environment. There are mainly two explanations for this scenario. First, the concept of sanitation at the level of implementation is understood in a narrow sense that is limited to access to toilets. The broader environmental implications are either neglected completely or kept aside for the time being. Second, the agencies implementing sanitation interventions treat the sanitation sector as a self-contained one leading to the governance of the sector exclusively by the policy framework on sanitation. This led to the undermining of environmental laws by agencies implementing sanitation interventions. This scenario inevitably leads to the partial realisation of the right to sanitation on the one hand, and affects the realisation of the right to environment on the other. Thus, sanitation interventions need to be conceptualised and implemented in the context of the link between the realisation of the rights to sanitation and environment.

The co-realisation of the rights to sanitation and environment requires a broader understanding of the right to sanitation and its relation with the right to environment by agencies implementing sanitation interventions and environmental laws. This essentially involves treating the statutory and policy framework addressing environmental dimensions of sanitation as an important part of the framework for realising both the rights.

PART-III

CASTE AND LABOUR DIMENSIONS

ERADICATION OF MANUAL SCAVENGING: TOWARDS ADDRESSING A CASTE-BASED SANITATION INJUSTICE

The term ‘manual scavenging’ refers to the practice of manually removing human excreta with bare hands, brooms or metal scrapers into baskets or buckets and carrying it to a dumping site.¹ This definition has evolved in the context of dry latrines.² A dry latrine, as the term indicates, is a latrine without a flush. Human excreta gets deposited on a pan or a surface and somebody is required to remove the excreta and clean the latrine.³ The practice of manual scavenging takes place in different forms. One aspect is the removal of human excreta from dry latrines. It could be from an individual household or from public toilets. It also includes cleaning of septic tanks, gutters and sewers.⁴ The existing legal definition of the term ‘manual scavenging’ is broad to cover both these aspects.⁵

¹ H Mander, *Resource Handbook for Ending Manual Scavenging* (International Labour Organisation 2014) 9.

² The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993, s 2(j): “manual scavenger” means a person engaged in or employed for manually carrying human excreta and the expression “manual scavenging” shall be construed accordingly.

³ *ibid* s 2(c): “dry latrine” means a latrine other than a water-seal latrine.

⁴ Human Rights Watch (HRW), *Cleaning Human Waste: Manual Scavenging, Caste and Discrimination in India* (Human Rights Watch 2014) 13; G Ramaswami, *India Stinking: Manual Scavengers in Andhra Pradesh and Their Work* (Navayana 2005) 1.

⁵ Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013, s 2(1)g: “manual scavenger” means a person engaged or employed, at the commencement of this Act or at any time thereafter, by an individual or a local authority or an agency or a contractor, for manually cleaning, carrying, disposing of, or otherwise handling in any manner, human excreta in an insanitary latrine or in an open drain or pit into which the human excreta from the insanitary latrines is disposed of, or on a railway track or in such other spaces or premises, as the Central Government or a State Government may notify, before the excreta fully decomposes in such manner as may be prescribed, and the expression “manual scavenging” shall be construed accordingly.

However, these contexts differ from a legal point of view. Cleaning of sewage and septic tanks are not legally prohibited activities. The key issues in this regard are unsafe working conditions, inadequate pay and the link between sanitation work and caste. At the same time, the practice of manual scavenging in the context of dry latrines is illegal. Therefore, the key issue is the total elimination of dry latrines and the associated practice of manual scavenging. This chapter mainly focuses on the issue of manual scavenging in the context of dry latrines, and issues in the context of sanitation work are discussed in chapter seven. An examination of the issue of manual scavenging would help to understand how the link between caste and sanitation leads to the violation of basic rights including the right to sanitation of some of the most marginalised group of people in India.

The next section examines the issue of link between caste and sanitation. It further examines the relevance of analysing the issue of manual scavenging in the context of the right to sanitation. The second section examines the relevant legal framework and analyses its effectiveness in addressing the issue. This is followed by the third section that examines the contribution of the movement by the manual scavenging community in eliminating the practice of manual scavenging as well as its potential to contribute to a nascent right to sanitation movement in India. A summary of issues is presented in the fourth section which is followed by a concluding section.

I. MANUAL SCAVENGING: SANITATION, CASTE AND VIOLATION OF RIGHTS

A. MANUAL SCAVENGING: MEANING AND MAGNITUDE OF THE ISSUE

Different terminologies are used to describe the practice of manual scavenging and manual scavengers, both in legal documents and in common parlance. While some laws use the term ‘manual scavengers’⁶, some others use the term ‘safai

⁶ eg Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993, s 2(j).

karmacharis'⁷ (this term could be translated as 'sanitation workers'). Laws on manual scavenging, in fact, use both these terms and they seem to draw a distinction between them.⁸ The term 'manual scavengers' appears to denote the prohibited activity of manually cleaning human waste from dry latrines or sewerage systems. At the same time, the term 'safai karmacharis' denotes sanitation workers employed for any sanitation work other than domestic work referring to the huge number of sanitation workers working under various local bodies, contractors and on an individual basis.

The practice of manual scavenging should have been eliminated a long time ago particularly in the context of its prohibition under the Constitution of India and various statutes as described in the next section. Nevertheless, the practice continues with impunity. While the Census of India 2011 shows that there are 7,94,390 dry latrines in the country,⁹ some of the recent estimates reveal progress, for instance, 13 States and Union Territories have reported that they have identified 12,737 manual scavengers as of January 2017.¹⁰ The available data including the Census data may not reveal the actual scenario because it focuses only on dry latrines. The magnitude of the problem will be much higher if the issue of disposal of human excreta in other situations, for instance from the premises of the Indian Railways, is also taken into consideration. A study points out that the number of manual scavengers in the country would be around 1.3 million if the employees of the Indian Railways are also counted.¹¹

Further, the official statistics may not be very accurate. For instance, in 2012, a government data claimed that there are no manual scavengers and dry latrines in

⁷ eg National Commission for Safai Karmacharis Act 1993, s 2(e).

⁸ Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013, s 2(1)(g); The Prohibition of Employment as Manual Scavengers and their Rehabilitation Rules 2013, r 2(h).

⁹ Office of the Registrar General and Census Commissioner, Census 2011, Table entitled 'State/UT & Distt-wise no. of Latrines which are Services Manually or by Scavengers'.

¹⁰ S Senthilir, 'Manual Scavenging: An Indelible Blot on Urban Life' *The Hindu* (25 March 2017) <www.thehindu.com/news/national/tamil-nadu/an-indelible-blot-on-urban-life/article17664714.ece>.

¹¹ P Karthikeyan et al, 'An Untold Miseries of Manual Scavengers in India with Reference to their Socio-Economic Status' (2014) 2(12) *Intercontinental Journal of Human Resource Research Review* 38, 41.

the state of Madhya Pradesh, but a study conducted by a non-governmental organisation revealed that there are around 3000 manual scavengers and 20,000 dry latrines in the state.¹² Nevertheless, the existing data itself shows the magnitude of the issue. The pervasive nature of the issue is very alarming because the practice of manual scavenging is continuing even in the capital city of Delhi,¹³ let alone the rural areas that are far away even from the district headquarters.

B. THE VICIOUS CIRCLE OF SANITATION, CASTE AND UNTOUCHABILITY

The link between the practice of manual scavenging and the caste system and associated untouchability is very strong. Manual scavenging has been described as a ‘practice squarely rooted in the concept of the caste system and untouchability’.¹⁴ The caste system organises society in a hierarchical structure with Brahmins at the top (the priest class), followed by Kshatriyas (the warrior/ruling class), Vaishyas (the traders’ class) and Sudras (labourers’ class). There are also people below the Sudras known as Ati-Sudras or untouchables (dalits).¹⁵ The caste of individuals is determined by descent. This is basically a system that ensures that ‘an individual remain within the community of his birth and follow the occupation of his father’.¹⁶ The rules of the caste system such as

¹² Anonymous, ‘Manual Scavenging Still Going on in MP’ *Daily News and Analysis* (7 April 2012)

<<http://dnasyndication.com/showarticlerss.aspx?nid=tZnTv1hG7PFf/1OW3dPulsIr1fw==>>.

¹³ A Jain, ‘Existence of Manual Scavengers in Delhi Shocks HC’ *The Hindu* (4 August 2016) <www.thehindu.com/news/cities/Delhi/Existence-of-manual-scavengers-in-Delhi-shocks-HC/article14550782.ece>.

¹⁴ *Safai Karmachari Andolan v Union of India* (2014) 11 SCC 224, 229 (Supreme Court of India) (SKA case). See also M Galanter, ‘Law and Caste in Modern India’ (1963) 3(11) *Asian Survey* 544, 552.

¹⁵ BR Ambedkar, *Annihilation of Caste* (Navayana, the Annotated Critical Edition 2014) 209; G Shah, ‘Caste and Untouchability: Theory and Practice’ in S Thorat and Aryamma (eds), *Ambedkar in Retrospect: Essays on Economics, Politics and Society* (Rawat 2007) 223, 226.

¹⁶ Omvedt defines caste as a ‘particular type of kinship system which gives closed (endogamous) groups that are hierarchically organized within a complex, agriculturally based surplus-producing society, philosophized and justified and thus maintained by Brahminical religion and ideology’. See G Omvedt, ‘Towards a Theory of Caste and Class’ in S Thorat and Aryamma (eds) (n 15) 251.

endogamy, division of labour, untouchability and denial of access to places and resources were/are governed by custom and enforced socially and economically.¹⁷

The caste system is one of the major reasons for violence and oppression against lower castes. The dalits, being at the lowest strata, are at the receiving end of violence and oppression from all other castes. The pervasive nature of violence sanctioned by the caste system is clear from an instance in Karnataka where dalits were denied access to barber shops in a village and their protest against this denial led to retaliation by the higher castes who set fire to their houses.¹⁸ Lack of access to village, social or cultural events for dalits is also not uncommon.¹⁹

The division of labour is one of the important foundational principles of the caste system. It allocates menial jobs such as cleaning and leather processing to the people in the lowest strata (mainly dalits).²⁰ There is no scope for individual choice or mobility.²¹ The allocation of menial jobs to lower castes is a kind of trap and a systematic way of oppression where birth determines the status of individuals and they have little choice to find other opportunities.²² Thus, manual scavenging has been termed as a form of modern day slavery.²³

Manual scavenging is an example of structural violence sanctioned and legitimised by the caste system in India. A commentator opined that ‘barring direct killing, the practice of manual scavenging represents the full-blown vicious

¹⁷ HRW (n 4) 11.

¹⁸ V Gopal, ‘Fair Cut: Caste Tensions Flare Over Access to Barbers in Two Karnataka Villages’ (2015) 7(1) Caravan 8.

¹⁹ B Rajagopal et al, From Promise to Performance: Ecological Sanitation as a Step toward the Elimination of Manual Scavenging in India—An assessment of Sanitation and Human Rights in Paliyad (Navsarjan and MIT 2006) 12.

²⁰ BN Srivastava, *Manual Scavenging in India: A Disgrace to the Country* (Concept Publishing 1997) 15; Ramaswamy (n 4) 5.

²¹ S Thorat, ‘Economic System, Development and Economic Planning’ in Thorat and Aryamma (eds) (n 15) 25, 40.

²² SD Permutt, ‘The Manual Scavenging Problem: A Case for the Supreme Court of India’ (2011) 20 Cardozo Journal of International and Comparative Law 277, 287.

²³ Rashtriya Garima Abhiyan, Eradication of Inhuman Practice of Manual Scavenging and Comprehensive Rehabilitation of Manual Scavengers in India (Rashtriya Garima Abhiyan 2011) 5.

circle of direct and structural violence'.²⁴ It has also been observed that the legitimisation of the allocation of manual scavenging work to dalits or the untouchables has led to making it look 'natural' and therefore, escaped social and legal interventions for a long time.²⁵ The success of the caste system is such that even the whole society including the manual scavenging community has internalised the caste based sanctions and division of labour.²⁶ Gatade explains that:

The only "explanation" possible for this state of affairs is that caste and related discriminations have become so common and ingrained in our psyche that nobody finds anything abominable. Perhaps this unique system of hierarchy—legitimised by the wider society and sanctified by religion—which has condemned a section of its own people to the "profession" of cleaning, sweeping and scavenging, has become a part of our thinking...In fact, we have designated communities who have been "forced" into this dehumanising profession since centuries.²⁷

There are different sub-castes among dalits involved in the practice of manual scavenging, namely Balmiki, Bhangi, Mehatar, Lalbegi, Chuhara, Mira (in Uttar Pradesh, Madhya Pradesh, Bihar, Punjab, Maharashtra) Hadi (in West Bengal), Paki (in Andhra Pradesh), and Thotti (in Tamil Nadu and Kerala).²⁸ According to a study, largely two communities are forced to practice manual scavenging—the 'Valmiki' (Hindus) and the 'Haila' (Muslims). The Hailas come under the Other Backward Castes category and the Valmiki (also written as Balmiki) belong to the SCs.²⁹ While hierarchy is a cardinal feature of the caste system in India, there is an internal hierarchy among different groups within the same caste. For

²⁴ M Shahid, 'Manual Scavenging: Issues of Caste, Culture and Violence' (2015) 45(2) Social Change 242.

²⁵ *ibid.*

²⁶ Personal interview with Bezwada Wilson, National Convener, Safai Karmachari Andolan.

²⁷ S Gatade, 'Silencing Caste, Sanitising Oppression' (2015) 50(44) Economic and Political Weekly 31.

²⁸ Srivastava (n 20) 17-19. Srivastava observes that 'the names of scavenging castes suggest that they are a functional community recruited from many different racial and social groups and members of different castes and communities have taken up this job due to economic constraints compulsions. See also SK Chaudhary, 'Dignity Defiled: Law and Policies for Manual Scavengers' *Countercurrents* (19 August 2011) <www.countercurrents.org/chaudhary190811.htm>.

²⁹ Joint submission by Rashtriya Garima Abhiyan, National Campaign on Dalit Human Rights and the International Dalit Solidarity Network, Violations of the right to water and sanitation, Submission to the UN Special Rapporteur on the human right to safe drinking water and sanitation, Ms. Catarina de Albuquerque for her annual thematic report to the Human Rights Council (February 2014).

example, the people who undertake the work of carrying human excreta are regarded as the lowest among the scavenging community.³⁰

The practice of manual scavenging further exposes a vicious circle where women are the most vulnerable among the vulnerables. A majority of the manual scavengers are women, while men undertake supervisory task.³¹ In some places, around 95–98 per cent of manual scavengers are women, whereas in some other places women constitute 100 per cent of the workforce.³² Women are systematically oppressed by both the caste system and patriarchy. Probably no other caste in India has handed over its work to women to the extent that it has happened in the case of manual scavenging.

The systemic nature of the issue is further clear from the fact that manual scavengers refer to the practice as their *jagir* (entitlement), meaning an inheritable entitlement to clean toilets in particular households in the village.³³ When something is projected as a ‘work’ or an ‘entitlement’, it carries a positive connotation and therefore effectively covers up the underlying violence and violation of rights.

In addition to violence, oppression and violation of dignity inflicted upon dalits, the practice of manual scavenging poses various other risks and threats. Use of alcohol and tobacco is quite common among manual scavengers and this is arguably one of the methods adopted by manual scavengers to overcome the disgust associated with their ‘work’.³⁴ Manual scavengers are also exposed to a number of diseases transmitted through direct contact with the human excreta.³⁵ For instance, women carry out manual scavenging even during pregnancy mainly because they cannot afford to lose their income. Carrying heavy load during

³⁰ Srivastava (n 20) 17.

³¹ Permutt (n 22) 287; Shahid (n 24) 248.

³² B Singh, *Unseen: The Truth about India's Manual Scavengers* (Penguin 2014) 247; Shahid (n 24) 248.

³³ HRW (n 4) 14–15. See also S Chaplin, *The Politics of Sanitation in India: Cities, Services and the State* (Orient Blackswan 2011) 169.

³⁴ Personal interview with Bezwada Wilson, National Convener, SKA. See also Rashtriya Garima Abhiyan (n 23) 14.

³⁵ *ibid.*

pregnancy may affect their health.³⁶ Manual scavengers are one of the most poorly paid communities. For instance, a scavenger woman on an average covers 20–30 households and the range of payment she gets is rupees 15–20 per month from a household.³⁷ The exploitation is to the extent that sometimes they do not even get this payment. Instead they get left over food or old clothes.³⁸

The practice of manual scavenging was continued, and was institutionalised, during the colonial rule. ULBs and institutions such as courts and railways set up during the colonial rule ‘liberally’ appointed manual scavengers from among dalits.³⁹ The colonial government did not challenge the status quo for economic and political reasons. The colonial logic was unquestionably followed even after independence because a fundamental change in social and economic status quo was apparently not a priority even after independence.⁴⁰

While the caste system justifies and normalises the practice of manual scavenging, the social indifference to manual scavengers further adds to the exploitation and discrimination faced by manual scavengers. The perception of the mainstream society is that manual scavengers are a ‘lazy’ and ‘unskilled’ community and that they have deliberately chosen this ‘job’ to make easy money.⁴¹ In some cases, the indifference is expressed in a different manner by glorifying the practice of manual scavenging as ‘spiritual work’ and by calling manual scavengers as the ‘guard of the health of the people’.⁴² However, the manual scavenging community is categorical in their response as reflected in Bezwada Wilson’s words that “nobody in the world can be happy to clean somebody’s shit for money”.⁴³

³⁶ Rajagopal et al (n 19) 22.

³⁷ Rashtriya Garima Abhiyan (n 23) 11.

³⁸ Shahid (n 24) 248.

³⁹ Ramaswamy (n 4) 6; MM Thekaekara, *Endless Filth: The Saga of the Bhangis* (Books for Change 2005) 3.

⁴⁰ A Teltumbde, ‘SC/STs and the State in the Indian Constitution’ *Countercurrents* (6 February 2012) <www.countercurrents.org/teltumbde060212.pdf>.

⁴¹ Shahid (n 24) 250.

⁴² For a detailed discussion on this, see Gatade (n 27); Ramaswamy (n 4) 93.

⁴³ Personal interview with Bezwada Wilson, National Convener, SKA.

C. MANUAL SCAVENGING AS AN ASPECT OF THE RIGHT TO SANITATION

The practice of manual scavenging is indeed an issue to be discussed primarily in the context of the caste system and the practice of untouchability. Caste based discrimination, violence and oppression are at the core of manual scavenging. At the same time, manual scavenging has a clear sanitation aspect as well and its eradication is relevant to the realisation of the right to sanitation from multiple angles.

First, as discussed in chapter 1, the practice of manual scavenging is directly linked to sanitation because it is about disposing human excreta and cleaning of toilets or sewers by human beings directly. As manual scavenging involves direct human contact with human excreta, it is undoubtedly an unsafe method of management of human excreta. The practice of manual scavenging both in the context of dry latrines and the sewerage system is incompatible with core human rights values such as dignity and safety. The value of safety in this context denotes both the safety of the human beings involved as well as safety of the environment.

Second, human dignity is a core element of the right to sanitation. The idea of dignity in the context of the right to sanitation is not limited to the individual act of easing oneself. It is equally applicable to everyone who is involved in the sanitation sector particularly those who carry out sanitation-related work. Therefore, the law and policy framework on sanitation must not tolerate a practice that forces some of the most marginalised people to clean human waste manually.

Third, demolition of dry latrines is an immediate practical step towards achieving the goal of eradication of manual scavenging. Modernisation of the sanitation system including the sewerage network is also equally important in this regard. In principle, the statutory and policy framework related to the right to sanitation shares these objectives (see chapter 2 for details). A safe and environment friendly system for the disposal of human excreta is a key goal of sanitation interventions. The ongoing effort to promote the construction and use of toilets is thus a

technical intervention that could contribute to the goal of eradication of manual scavenging.

The link between sanitation and manual scavenging is direct and obvious. Some of the immediate technical interventions to eradicate manual scavenging could be put forth by sanitation interventions. The elimination of manual scavenging is essential not just from a caste perspective, but from a right to sanitation point of view as well. At the same time, it needs to be underlined that the sanitation aspect is only one of the several aspects of manual scavenging and probably not even the most important one. The caste system and untouchability are the fundamental reasons that perpetuate the practice of manual scavenging. These are indeed not technical issues that could be addressed through technical solutions or interventions such as flush toilets. Thus, the contribution of the law and policy framework for sanitation needs to be seen more as an immediate technical intervention and it may not address the root causes of manual scavenging.

II. LEGAL PROHIBITION OF MANUAL SCAVENGING: CASTE PREJUDICE AND INDIFFERENCE

The practice of manual scavenging has been illegal at least since the adoption of the Constitution of India. Since the 1950s, several statutes have been adopted to make the employment of manual scavengers a criminal offence as well as to promote the social and economic welfare of the manual scavenging community. However, laws related to manual scavenging have a poor track record of implementation. Undoubtedly, the non-implementation of laws has adversely affected the realisation of several human rights including the right to sanitation. This section analyses constitutional and statutory provisions related to manual scavenging and discusses the reasons for their poor implementation.

**A. LEGAL PROHIBITION: FROM GENERAL ABOLITION OF
UNTOUCHABILITY TO SPECIFIC LAWS**

The Constitution of India, in no uncertain terms, abolishes untouchability and its practice in any form.⁴⁴ The makers of the Constitution were abundantly clear about, and there was overwhelming consensus on, the need for the explicit prohibition of untouchability in the Constitution of India.⁴⁵ Given the fact that the practice of manual scavenging derives from untouchability, the constitutional ban could be interpreted as a ban on manual scavenging.⁴⁶ The Constitution of India also requires the government to criminalise the practice of untouchability. The specific prohibition of untouchability in the Constitution of India is in addition to the general prohibition of discrimination on the basis of caste among other things.⁴⁷

The constitutional ban on untouchability and the consequential ban on manual scavenging have been further elaborated and effectuated through statutes. Thus, compelling any person to practice scavenging is a criminal offence under the Protection of Civil Rights Act 1955.⁴⁸ The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 was adopted to tackle the instances of organised violence against dalits. This statute, as it was originally adopted, did not include the practice of manual scavenging under the definition of ‘atrocities’ in section 3 of the act. However, it addressed the issue indirectly by prohibiting all forms of forced or bonded labour by persons belonging to SCs and STs.⁴⁹ Given the fact that the practice of manual scavenging is in a way a bonded labour, it could be treated as a punishable offence under this law.⁵⁰

⁴⁴ Constitution of India 1950, art 17.

⁴⁵ Constitution Assembly Debates (29 November 1948) <<http://parliamentofindia.nic.in/ls/debates/vol7p15.htm>>.

⁴⁶ Mander (n 1) 15.

⁴⁷ Constitution of India 1950, art 15.

⁴⁸ Protection of Civil Rights Act 1955, s 17A: Whoever compels any person, on the ground of “untouchability”, to do any scavenging or sweeping or to remove any carcass or to flay any animal or to remove the umbilical cord or to do any other job of a similar nature, shall be deemed to have enforced a disability arising out of “untouchability”.

⁴⁹ Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989, 3(1)(vi).

⁵⁰ *ibid* s 3(1)(vi).

It is surprising that the term ‘manual scavenging’ has not found a place explicitly in the statute although the objective of the law was to prevent atrocities against the members of SCs and STs. A plain reading of the list of offences mentioned in this statute indicates that the law was sought to address physical violence and oppression. The practice of manual scavenging was probably seen as ‘work’ and not a manifestation of caste-based ‘violence’ or ‘oppression’. However, this approach has undergone a drastic change and led to the inclusion of manual scavenging as an explicit form of atrocity through an amendment in 2015.⁵¹

The generic laws mentioned above were apparently not effective in addressing the issue of manual scavenging. The late 1980s and the early 1990s were the time when the manual scavengers’ movement began to take shape.⁵² The issue slowly started appearing in the media as well, and there was a manifold increase in the visibility of the issue. These developments led to the adoption of a specific law on manual scavenging in 1993, that is, the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993 (1993 Act).

The 1993 Act prohibits the employment of manual scavengers and construction or continued use of dry latrines.⁵³ It also focuses on conversion of dry latrines into water-based flush latrines as a means to end manual scavenging. In this regard, the 1993 Act requires state governments to implement schemes for conversion of dry latrines into water-seal latrines.⁵⁴ It empowers state governments to appoint a District Magistrate or a Sub-Divisional Magistrate as the Executive Authority to implement the law.⁵⁵ The 1993 Act also envisages an institutional mechanism at the union and state levels (committees) to look after different schemes to convert dry latrines into water seal toilets.⁵⁶ An interesting aspect of the 1993 Act is the way in which it views the issue of dry latrines. It focuses significantly on the

⁵¹ Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act 2015, s 3(1)(j).

⁵² Source: personal interview with Bezwada Wilson, National Convener, Safai Karamchari Andolan.

⁵³ Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993, s 3.

⁵⁴ *ibid* s 6.

⁵⁵ *ibid* s 5.

⁵⁶ *ibid* s 13.

environmental implications of the operation of dry latrines. For instance, it authorises the Executive Authority to take measures to prevent or mitigate the environmental pollution caused by dry latrines.⁵⁷ The Act prescribes penalties for violation, which could extend to imprisonment up to one year or fine up to rupees 2,000 or both.⁵⁸

Along with the 1993 Act, the Union Government adopted the National Commission for Safai Karamcharis Act 1993.⁵⁹ This law has established the National Commission for Safai Karamcharis (NCSK) to protect the interests and rights of safai karmacharis. The NCSK was set up initially for three years and subsequently its term was extended through government notifications from time to time.⁶⁰ The NCSK is empowered to investigate grievances as well as matters relating to the implementation of programs and schemes for the welfare of manual scavengers.⁶¹

One of the major criticisms of the 1993 Act, according to Bezwada Wilson, was that it prioritises sanitation over the human dignity of manual scavengers. The existence of adequate facilities for use of water seal latrines is a pre-condition for demolishing dry latrines.⁶² It has been argued that the 1993 Act ignores the issue of human dignity, which is mentioned in the preamble of the Act itself.⁶³ Another major drawback of the Act is that individuals are not allowed to file a complaint.⁶⁴ Specifically appointed authorities have the power to initiate legal actions.⁶⁵ As a result, very few criminal cases have been filed under the 1993 Act because the appropriate authority to initiate legal actions was the same authority against whom the complaints were to be filed. Further, the law depended heavily on state

⁵⁷ *ibid* s 10.

⁵⁸ *ibid* s 14.

⁵⁹ National Commission for Safai Karamcharis Act 1993.

⁶⁰ National Commission for Safai Karamcharis, Annual Report 2015-16, 4

⁶¹ *ibid* s 8(1).

⁶² Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993, s 3(2).

⁶³ Mander (n 1) 17.

⁶⁴ Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993, s 17(2) and 17(3).

⁶⁵ *ibid*.

governments as it was passed under article 252 of the Constitution of India.⁶⁶ Thus, the Union Government had little control over the implementation of the Act.⁶⁷

A major challenge faced by the 1993 Act was that it was adopted by invoking article 252 of the Constitution of India that allows the Parliament to enact a law on subject-matters that are in the domain of state legislatures. However, such a law will only be applicable in states that adopt a resolution in this regard. Resultantly, the law was initially applicable to only a few states—Andhra Pradesh, Goa, Karnataka, Maharashtra, Tripura and West Bengal and to all the Union Territories. It was expected that the remaining states would bring the law into force in their respective jurisdictions. Against this expectation, the years that followed the adoption of the 1993 Act witnessed a poor response from state governments both in terms of formally applying the law and in terms of effectively implementing the law wherever it was applicable. In fact, the years that followed the adoption of the 1993 Act witnessed an increase in the number of dry latrines and manual scavengers.⁶⁸ This scenario along with many other factors (discussed in the next section) led to the adoption of a new law in 2013, that is, the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 (2013 Act).

There are several changes from the 1993 Act to the 2013 Act. While the 1993 Act was neutral and blind to the link between caste and manual scavenging, the 2013 Act is explicitly premised upon the ‘historical injustice and indignity’ inflicted upon manual scavengers.⁶⁹ It recognises the ‘iniquitous caste system’ as a major reason for the continuance of manual scavenging.⁷⁰ The credit for these

⁶⁶ Art 252 of the Constitution of India allows the Parliament to enact a law on subject-matters that fall within the legislative domain of state governments provided two or more states have given permission through a resolution passed by the legislative body of the states. Such laws are applicable to states that have passed the resolutions in this regard and other states can bring the law into force into their jurisdiction by passing similar resolutions.

⁶⁷ Permutt (n 22) 294.

⁶⁸ *SKA* case (n 14).

⁶⁹ Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013, Preamble.

⁷⁰ *ibid.*

developments should go to the continuous and collective effort of the manual scavenging community.

It is also worth emphasising that the 2013 Act has brought the issue of rehabilitation to the front along with the objective of criminalising the employment of manual scavengers. The 2013 Act entitles individuals who have been engaged as manual scavengers to one-time cash assistance, scholarships for their children, housing, alternative livelihood support, and other legal and programmatic assistance.⁷¹ The 2013 Act, however, leaves rehabilitation under existing schemes of the Union Government and state governments to be implemented by local authorities.⁷² As far as criminalisation is concerned, the 2013 Act has strengthened the provision by making the offences under the Act non-bailable.⁷³

Like the 1993 Act, this Act also prohibits the construction or maintenance of insanitary toilets and the engagement or employment of anyone as a manual scavenger. One of the major advancement made by this law is the expanded definition of the term ‘manual scavenger’ adopted by the Act that includes not only the practice of manual scavenging in the context of dry latrines but also other forms of the practice such as cleaning of sewers and septic tanks.⁷⁴ Unlike the 1993 Act, the 2013 Act specifically imposes obligations upon state governments (most importantly local authorities) to provide adequate sanitation facilities particularly community toilets to eliminate dry latrines as well as open defecation—two important reasons that lead to manual scavenging.⁷⁵

The 2013 Act focuses on institutional aspects as well. It establishes vigilance committees and monitoring committees at the state level as well as a Central Monitoring Committee.⁷⁶ Further, it gives the NCSK a more prominent

⁷¹ *ibid* s 13(1).

⁷² *ibid*.

⁷³ *ibid* s 22.

⁷⁴ *ibid* s 2(1)(g).

⁷⁵ *ibid* s 4(1).

⁷⁶ *ibid* ss 24 & 30.

institutional role as an agency to monitor the implementation of the Act.⁷⁷ This is an important development given the fact that the provisions on institutions in the 1993 Act were voluntary and it proved to be a failure in the light of the lack of interest from the state governments.

While the 2013 Act is a big step forward from the 1993 Act in terms of its substance, it still is far from adequate. For instance, the 2013 Act does not apply to people wearing or using protective gears and devices as notified by the Union Government. According to Bezwada Wilson, this is nothing but an escape clause for local and railway authorities to continue to engage manual scavengers. Mr Wilson also underlines that the 2013 Act does not prescribe a cut-off date for the total elimination of manual scavenging and therefore there could be more delays and excuses before the practice of manual scavenging is totally eliminated.⁷⁸

B. CASTE PREJUDICE, STATE APATHY AND NON-IMPLEMENTATION OF LAWS

A number of statutes focus on the caste aspects as well as sanitation aspects of manual scavenging. Nevertheless, manual scavenging continues unabated. This scenario raises questions about the adequacy of these statutes and their implementation. Three factors are relevant to explain the failure of laws in this regard.

1) Reluctance of the State to recognise the issue

State governments and various public authorities have been by and large reluctant to recognise the issue of manual scavenging. As a result, the statutes related to the practice of manual scavenging have been inadequately implemented or not implemented at all. The trajectory of the 1993 Act provides ample proof to

⁷⁷ *ibid* s 31(1).

⁷⁸ Personal interview with Bezwada Wilson, National Convener, Safai Karamchari Andolan. It is to be noted that the 2013 Act does not repeal the 1993 Act. It states that the provisions of the Act will have overriding effect over the 1993 Act and all other law or legal instrument (s 3). This technically means that both the statutes will be in force. This scenario probably owes to the legal process followed in the adoption of the 1993 Act as the Union Government did not want to go back to state governments to seek permission to repeal the 1993 Act.

illustrate the indifference and denialism of the government. As far as the 1993 Act was concerned, the law was passed in 1993 and it received the President's assent in 1997. Initially, only five state governments gave their prior approval for the law and no other states showed any interest until 2005. Many states had to be forced to even make the law applicable in their jurisdiction. For example, Delhi decided to recognise the 1993 Act only in 2010 after the Supreme Court of India had issued directions to all states (the Supreme Court case is discussed in the next section).⁷⁹ Several states were reluctant even after the Supreme Court of India had issued directions to all state governments in this regard.⁸⁰ The reluctance to even recognise the issue of manual scavenging explains why the existing laws prior to 1993 were not properly implemented and why the 1993 Act was poorly implemented in the subsequent decades. The Indian state has been repeatedly extending the time limit for completely eliminating manual scavenging and a report points out that the government extended the time limit eight times till 2014.⁸¹

The insensitivity of the state governments is to the extent that certain implementing agencies were not even aware of the 1993 Act. For example, the High Court of Patna observed in a case that:

It is startling that the state administration in Bihar except one Municipality of Muzaffarpur does not even know that there is the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act of 1993'.⁸²

The Court went on to direct that:

[L]et the administrators and the Ministry go back to their desks and take their Constitution of India out and reorient themselves on the subject and come back to this Court after two weeks to give the full details on what Bihar has done to eradicate untouchability and all its variations, particularly manual scavenging, the programme, the budget, the allocation, the implementation, all these figures since 1950 to the present day.⁸³

State governments and various public sector undertakings that were accused of employing manual scavengers have always denied the existence of manual

⁷⁹ Singh (n 32) 208.

⁸⁰ *ibid* 207-8. See also NCSK, Second Annual Report 1995-96 (NCSK 1996) 93.

⁸¹ HRW (n 4) 33.

⁸² *Lalit Kishore and MP Gupta v State of Bihar* Civil Writ No 6098 of 2003, Judgment of 14 August 2003, MANU/BH/0225/2003 (High Court of Patna) para 5.

⁸³ *ibid* para 12.

scavenging. For example, seven principal secretaries of state governments testified through affidavits before the Supreme Court of India that the practice of manual scavenging did not exist in their concerned jurisdictions. The affidavits were proved to be incorrect when the petitioner in the case—Safai Karmachari Andolan—submitted photographic and video evidence from several states.⁸⁴ The Indian Railways, a public sector enterprise, is perhaps the largest employer of manual scavengers and at the same time it consistently denied the fact for many years.⁸⁵ An extreme version of the attitude of denial and indifference could be seen when the Indian Railways argued that no action under the 1993 Act was needed as long as people are not carrying human excreta on their head.⁸⁶

Whenever the government recognised the existence of manual scavenging, the magnitude of the issue was almost always downplayed. For instance, there is a huge disparity between the facts and figures in government data and reports by independent studies.⁸⁷ It appears that either state governments did not make efforts to ascertain the magnitude of the issue or deliberately decided to trivialise it. In either case, there was no serious intention to address the issue.

2) *The influence of caste*

The caste system is a significant force in India that normalises or legitimises many practices, including the practice of manual scavenging, which is otherwise illegal and unacceptable. Thus, Narula observes that:

Rights and privileges are negotiated, assigned, and denied not just in the courtroom, the police station, or even the legislature, but in non-formal social spaces where “upper-caste” privilege and “upper-caste” rights are rarely contested on legal or moral grounds.⁸⁸

The pervasive nature of caste coupled with the domination of members of upper castes in various positions in the public administration makes the whole system

⁸⁴ B Wilson, ‘Why is it so Difficult to Free India of Manual Scavenging?’ *Kafila* (22 December 2010) <<https://kafila.online/2010/12/22/why-is-it-so-difficult-to-free-india-of-manual-scavenging/>>. See also Singh (n 32) 212.

⁸⁵ Singh (n 32) 218.

⁸⁶ *ibid* 210.

⁸⁷ HRW (n 4) 52.

⁸⁸ S Narula, ‘Equal by Law, Unequal by Caste: the “Untouchable” Condition in Critical Race Perspective’ (2008) 26(2) *Wisconsin International Law Journal* 255, 336.

essentially casteist in nature.⁸⁹ The rules of the caste system including the division of labour will not look like a problem or an issue in such a system. It may not be completely incorrect to state that ‘the rule of law lives in the shadow of the rule of caste’.⁹⁰ This probably explains the huge gap between constitutional and statutory norms and aspirations on the one hand and the social reality on the other hand. It also explains the low registration of criminal cases and the low conviction rate under the 1993 Act, despite the high number of atrocities.⁹¹

This could be attributed to the caste bias of prosecutors as well as other implementing agencies including the judiciary.⁹² For instance, the police may refuse to register and investigate crimes against dalits if the perpetrators are from a dominant caste.⁹³ The police, in some cases, close the complaint at the preliminary stage of investigation citing technical grounds, for instance if witnesses are also from the same community as that of the victim(s).⁹⁴ Further, the members of the manual scavenging community face threat and pressure when they try to leave the practice of manual scavenging. There are instances where the pressure from people of upper castes coupled with the lack of support from government agencies forced the people who had left the practice of manual scavenging to return to it.⁹⁵

⁸⁹ A Ramaiah, ‘Growing Crimes Against Dalits in India Despite Special Laws: Relevance of Ambedkar’s Demand for Special Settlement’ (2011) 3(9) *Journal of Law and Conflict Resolution* 151.

⁹⁰ Narula (n 88) 267.

⁹¹ There is no systematic data available on the cases filed under the 1993 Act. However, the manual scavengers’ movement and its supporters have been highlighting this issue and the available information points to the negligible number of cases filed under this law when compared to the practice which is widespread. For instance, Mander (n 1) notes that ‘[I]n Haryana, for the first time anywhere in the country since this law was enacted 17 years ago, 22 people were sent to jail for employing manual scavengers’. See also Gatade (n 27).

⁹² Permutt (n 22) 293; J Schauman, *From Slavery to Dignity: How Critical Thinking and Empowerment Among Dalit Women Working with Manual Scavenging is Implemented* (Södertörn University, Bachelor Thesis 2012).

⁹³ HRW (n 4) 47; Ramaiah (n 89) 153.

⁹⁴ S Khora, ‘Final Reports under Sec-498A and the SC/ST Atrocities Act’ (2014) 49(41) *Economic and Political Weekly* 17.

⁹⁵ RK Singh and Ziyauddin, ‘Manual Scavenging as Social Exclusion: A Case Study’ (2009) 44 (26&27) *Economic and Political Weekly* 521, 523.

3) *Manual scavengers in the public sector: when the protectors are the violators*

Manual scavenging is an issue where the State has been violating various statutes and the Constitution of India not just through its inaction but through its actions as well. The government and public sector undertakings are also the major employers of manual scavengers. For instance, local bodies (both rural and urban) in various places employ manual scavengers to manually clean toilets and open defecation areas.⁹⁶ Local bodies also indulge in pressure tactics such as withholding payments, threat of eviction from government housing and disconnection of water supply to force manual scavengers to stay on in the ‘work’.⁹⁷ These pressure tactics are likely to work given the fact that manual scavengers are already living in dire poverty and they face lack of alternative employment opportunities. Similarly, a large number of manual scavengers work with the Indian Railways—a public sector undertaking of the Union Government.⁹⁸

The fact that the government and public sector undertakings have been relying on the practice of manual scavenging to fulfil their statutory duties or maintain their premises (eg the Indian Railways) illustrates a dangerous scenario where the protectors are also the perpetrators. It is quite natural that the law has been by and large a failure as little can be expected from law when the State and its agencies are complicit in the violation of the rights of manual scavengers.

III. MANUAL SCAVENGERS’ MOVEMENT: UNHELPFUL STATE AND SELF-REALISATION OF RIGHTS

The caste prejudice and the indifference of the State as well as the society led to the non-implementation or inadequate implementation of statutes related to manual scavenging. The practice of manual scavenging violates several human rights including the right to sanitation. This scenario has led a social movement by

⁹⁶ HRW (n 4) 52.

⁹⁷ *ibid* 59.

⁹⁸ Singh (n 32) 223.

the manual scavenging community to assert and demand their rights (the Movement).⁹⁹ The proactive responses and protests of the manual scavenging community have been a major driving force that triggered significant changes towards the eradication of manual scavenging. The achievements of the Movement are relevant in the right to sanitation context as well.

The Movement is probably the only organised movement in the right to sanitation context although it deals with only one aspect of the right. Unlike many other rights, for instance water and food, people have not yet started claiming sanitation as a matter of right collectively. Although sanitation is a site of violation of several human rights, its articulation as a right among the general public is still in a nascent stage.¹⁰⁰

The contribution of the Movement to the realisation of the right to sanitation could be explained in different ways. Demolition of dry latrines has been an important aspect of the Movement. Further, the Movement has been instrumental in highlighting the caste dimension of sanitation and it works towards delinking sanitation from caste. These are indeed major steps towards the realisation of the right to sanitation. In this context, it is very important to understand how the movement worked and what it has achieved so far. Many of the areas where the Movement has made significant progress are equally applicable in the case of sanitation as a whole. Therefore, the experience of, and the challenges faced by, the Movement provides important lessons for the ongoing efforts to build a right to sanitation movement. There are three main areas where the Movement has

⁹⁹ The manual scavengers' movement is a collective of several organisations and individuals such as Safai Karamchari Andolan, Jan Sahas (Madhya Pradesh), Navsarjan (Gujarat) and the National Campaign on Dalit Human Rights. It is a collective of movements from different parts of the country. The term 'movement' is used in this chapter in a broad sense to indicate their collective efforts in totality and not to indicate a particular campaign or protest by a particular organization or group of individuals.

¹⁰⁰ A network of NGOs and activists initiated a right to sanitation campaign a couple of years ago. In some cases, certain groups and networks working on the right to water have taken up the right to sanitation. However, these efforts are NGOs driven and not necessarily of the collective of the marginalised group whose right to sanitation is mostly violated on a daily basis. See Right to Sanitation Campaign in India, 2014: <<http://conflicts.indiawaterportal.org/sites/conflicts.indiawaterportal.org/files/rts%20convention%20delhi%20-%20invitation.pdf>>; Forum for Policy Dialogue on Water Conflicts in India, Right to Water and Sanitation: <<http://waterconflictforum.org/right-to-water>>.

achieved significant progress and these are relevant for the realisation of the right to sanitation as well.

A. UNCOVERING SYSTEMIC CAUSES AND RECLAIMING DIGNITY AND RIGHTS

Manual scavenging has been an invisible issue. While the ruling class and the mainstream society did not discuss this issue, the manual scavenging community also remained a set of people without voice. The caste factor is so strong that the oppressed also shared the oppressors' narratives and dominance, which, in effect, leaves little scope for resistance. According to Bezwada Wilson, the National Convener of the Safai Karmachari Andolan, the self-acceptance of the oppressed status was one of the major hurdles the Movement wanted to overcome first. In fact, the Movement has been working to help the manual scavenging community to realise that they are as much human as others and are worthy of all the rights and freedoms enjoyed by others. In a way, it was a process of destroying their own deep-rooted understanding of their social, political and legal status shaped by the caste-system and re-conceptualising their life as that of human beings and citizens.

One of the landmark developments in the trajectory of the Movement was its transformation to project itself as a struggle for dignity and rights. The language of dignity and rights undoubtedly helped the Movement to locate the struggle of the community in the larger domain of the anti-caste movement in India as well as in the context of resistance against untouchability. The emancipatory power of the idea of dignity and rights has apparently strengthened the Movement significantly and led to the projection of baskets and brooms as symbols of indignity.

The association of baskets and brooms with indignity eventually found its way into one of the popular manifestations of the Movement called 'daliya jalao' (burning the basket) campaign.¹⁰¹ Soon the Movement began highlighting brooms and baskets as symbols of their oppressed status and the act of burning them as a

¹⁰¹ A Gupta, 'Daliya Jalao: Liberating Manual Scavengers and Moving Towards Total Sanitation' (2013) 1(2) Journal of Land and Rural Studies 145.

mark of liberation.¹⁰² The narrative is extremely compelling in a context where brooms and baskets are seen by the manual scavenging community as ‘essential work tools or property’ that they used to bequeath to their next generations. The bequeathing of basket and broom by a mother-in-law to a daughter-in-law after marriage as a continuum of the wedding rituals was not uncommon among the manual scavenging community.¹⁰³ Manual scavengers, particularly women, publicly burnt their brooms and baskets in several places and declared their freedom from a centuries-old hegemonic and oppressive practice.

B. THE *SAFAI KARMACHARI ANDOLAN (SKA) CASE AND IMPLEMENTATION OF LAWS BY THE RIGHT-HOLDERS*

The issue of manual scavenging shows that in some cases laws do not get implemented easily especially when the issues at stake are related to the rights of historically marginalised classes. The right-holders often need to take proactive steps to get the laws implemented. The Movement is a classic example in this regard as it has been playing a leading role to ensure the implementation of the law.

The poor implementation of laws coupled with the indifference of implementing agencies led the Movement to approach the Supreme Court of India to seek proper implementation of the laws.¹⁰⁴ In 2003, the *SKA case* was filed as public interest litigation in the Supreme Court of India by SKA along with six other civil society organisations.¹⁰⁵ The Supreme Court of India treated the writ petition as a

¹⁰² *ibid* 155.

¹⁰³ Anonymous, ‘Burning the Basket of Indignity’ *Uday India* (16 February 2013) <<http://udayindia.in/2013/02/16/burning-the-basket-of-indignity/>>.

¹⁰⁴ *eg SKA case* (n 14). Other cases that raised the issue of manual scavenging or the issues faced by dalits in general are: *Campaign against Manual Scavenging v State of Maharashtra* Public Interest Litigation No 8 of 2012, Order of 5 March 2015 (High Court of Bombay); *National Campaign for Dalit Human Rights v Union of India* Writ Petition (Civil) No 140 of 2006, Judgment of 15 December 2016 (Supreme Court of India).

¹⁰⁵ *Safai Karmachari Andolan v Union of India* Writ Petition (Civil) No 538 of 2003 (Supreme Court of India). The other civil society organisations who joined the writ petition as petitioners were Jan Sahas, Madhya Pradesh (Petitioner No 2), Adharshila, Uttar Pradesh (Petitioner No 3), Young Women’s Christian Association, Chennai (Petitioner No 4), Safai Kamgar Parivartan Sangh, Maharashtra (Petitioner No 5), Dalit Research Institute, Uttar Pradesh (Petitioner No 6) and National Campaign for Dalit Human Rights, Hyderabad (Petitioner No 7).

continuing mandamus for eleven years and issued a number of orders and directions. The case was finally disposed of by the Court in March 2014 in the light of the 2013 Act.¹⁰⁶ The Court explicitly stated that ‘inasmuch as the Act 2013 occupies the entire field, we are of the view that no further monitoring is required by this Court’.¹⁰⁷ The Court further re-emphasised the duty of state governments and union territories to fully implement and to take action against the violators. Instead of analysing all the developments in the case chronologically, this section focuses on developments that are also relevant in the right to sanitation context.

The *SKA* case mainly focused on two aspects of the issue. First, it focused on the need for the complete eradication of the practice of manual scavenging by forcing state governments to adopt and implement the 1993 Act. Second, the case focused on the issue of rehabilitation of manual scavengers.

The Movement used the *SKA* case as a tool or a strategy to force the implementation of the 1993 Act. According to Mr Wilson, the initial efforts of the Movement with different state governments were disappointing as nobody took them seriously.¹⁰⁸ He underlined the fact that various orders of the Supreme Court of India has provided the Movement with a powerful weapon to negotiate with the state governments and to force them to implement the law. The active role of the Supreme Court of India and the use of its orders by the Movement has even led some commentators to argue for a more positive role to be played by the Court.¹⁰⁹

The case pushed the state governments and different ministries of the Union Government to submit affidavits regarding the status of manual scavenging in their respective jurisdictions. Given the fact that various government departments and agencies had been categorically denying the existence of manual scavengers, the case provided an opportunity for the Movement to establish the truth. When various government departments and agencies filed affidavits that denied the issue

¹⁰⁶ *SKA* case (n 14).

¹⁰⁷ *ibid* para 15.

¹⁰⁸ Personal interview with Bezwada Wilson, National Convener, SKA.

¹⁰⁹ *Permutt* (n 22) 284.

of manual scavenging, the Movement disproved it by providing evidence through what Ms Shomona Khanna—one of the lawyers who represented the Safai Karamchari Andolan before the Supreme Court of India—described as a ‘ground-truthing exercise’.¹¹⁰ The *SKA* case provided a platform for the Movement to expose the lies of the government. It also provided an opportunity to the community to obtain more information and to demand accountability from the government.

The *SKA* case further pushed several state governments to adopt the 1993 Act. On the one hand, several states were reluctant to adopt the law and on the other hand, the states that had adopted the 1993 Act delayed the appointment of executive authorities to implement the law. The Supreme Court of India interfered and directed state governments to provide reasons for not adopting the 1993 Act or for not appointing an Executive Authority under the 1993 Act even after adopting the law.¹¹¹ The interference of the Court indeed forced at least some state governments to adopt and implement the law. For example, in 2010, Delhi recognised the 1993 Act after the Supreme Court of India had issued directions to all state governments.

At the local level, the Movement directly initiated the implementation of the 1993 Act by destroying dry latrines. In some cases, volunteers took photos of dry latrines and warned the owners of the legal consequences by citing the 1993 Act. The volunteers had to fight even judges at the local level as dry latrines were also found in a court premises. For instance, in 2004, in the pre-bifurcation State of Andhra Pradesh, a junior civil Judge prevented volunteers from demolishing a dry latrine situated on court premises on the ground that it was a government property. The junior civil Judge also issued an order asking the volunteers to get permission from the concerned District Judge to demolish the dry latrine. The movement used this opportunity and highlighted this issue as an instance of insensitivity even of judicial officers. The direct implementation of the law by the Movement in certain

¹¹⁰ Source: personal communication with Ms Shomona Khanna.

¹¹¹ *SKA* writ petition (n 105) Order of 11 December 2007.

villages had wider impacts it led local bodies in the neighbouring areas to destroy dry latrines in their jurisdictions.¹¹²

The Movement has also played a significant role in educating the general public as well as government agencies who were responsible for implementing the law. There were occasions where volunteers, mainly women, took copies of the law and the Supreme Court's orders to the administration and demanded rehabilitation. According to Mr Wilson, volunteers personally went and gave a copy of the 1993 Act and various orders of the Supreme Court of India to District Collectors and Magistrates in not less than 240 districts.¹¹³

C. CONTRIBUTION TO, AND LESSONS FOR, THE REALISATION OF THE RIGHT TO SANITATION

The Movement has contributed significantly to the realisation of the right to sanitation. For instance, demolition of dry latrines and elimination of manual scavenging is an important step towards realisation of the right to sanitation (and other rights) of both the concerned manual scavengers and the larger public due to its implications for public health and the environment. Further, it exposes, and challenges, the link between caste and sanitation particularly sanitation work. This is important from a right to sanitation perspective because allocation of menial jobs to some of the most marginalised sections of the society infringes upon their dignity and the framework for the realisation of the right to sanitation must not tolerate such an exploitative system.

The Movement and its use of law are important lessons for a right to sanitation movement that may emerge eventually. Most importantly, the Movement highlights the fact that right-holders need to organise themselves and claim their right to sanitation. This is particularly important in a context when right-holders generally do not perceive sanitation as a matter of right. The Movement provides an important lesson in this context because it took them a while to understand the elimination of manual scavenging as their right and a duty of the State.

¹¹² Ramaswamy (n 4) 63.

¹¹³ Personal interview with Bezwada Wilson, National Convener, SKA.

IV. TOWARDS RECLAIMING DIGNITY AND REALISING THE RIGHT TO SANITATION

In India, the practice of manual scavenging has a long history. The practice has been continued over several centuries, if not more, because it was justified on the basis of the caste system.¹¹⁴ The religious sanction of the caste system effectively covered the elements of oppression, exploitation and violence involved in it and made them look ‘natural’ and ‘normal’. The extent of the normalisation process was such that even the oppressed castes have psychologically accepted their so-called inferior status.

While manual scavenging is a part of broader caste-based oppression and violence in India, it has many complex layers and some of these layers are closely linked to the right to sanitation. Manual scavenging as a practice of management of human excreta is totally incompatible with the idea of safe sanitation from a public health and environmental point view. It violates the right to sanitation of the community as a whole, not just the individuals who defecate in dry latrines and the concerned manual scavengers. More importantly, the practice violates several basic tenets of human rights of the concerned manual scavengers including the right to dignity, the right against untouchability and the right against discrimination. At a broader level, the practice of manual scavenging also exposes the lack of concern for the safety of certain classes of people while they earn their livelihood. Therefore, the practice of manual scavenging must be eliminated without delay both from a sanitation point of view and from the point of view of the rights of manual scavengers.

Over the years, a number of statutory and policy initiatives have been undertaken to address the issue. From a legal point of view, employing a manual scavenger is a criminal act as per both the 1993 Act and the 2013 Act. Overall the legal message is loud and clear that manual scavenging must be eliminated. These statutes are extremely important in the sanitation context because they seek to

¹¹⁴ Ramaswamy (n 4) 5. See generally Ambedkar (n 15).

eliminate one of the worst aspects of sanitation in India that violates dignity, among other rights, of one of the most marginalised classes.

While the laws have been following a prohibitory approach, the policy framework has implemented more affirmative actions. The Union Government has been implementing various schemes from time to time for the conversion of dry latrines into flush latrines and for the rehabilitation of manual scavengers.¹¹⁵ Sanitation interventions have been promoting the construction and use of toilets in rural and urban areas over the last few decades. Similarly, safe disposal of waste including human excreta has been a focus of sanitation-related laws and policies for the last several decades. These sanitation interventions are relevant from a manual scavenging point of view as they seek to eliminate the physical condition (lack of sanitation) that requires manual scavenging. The policy framework for sanitation has progressively started mentioning the practice of manual scavenging. For example, the SBM-Urban Guidelines recognise the elimination of manual scavenging as one of its goals.¹¹⁶

Constitutional provisions, statutes and the policy framework have managed very little progress so far in terms of eradicating the practice of manual scavenging. As discussed in this chapter, laws related to manual scavenging have been either not implemented or inadequately implemented. Similarly, the policy framework has also met with either poor implementation or it has followed a myopic approach to the issue of manual scavenging. For instance, the implementation of sanitation interventions did not even take off in the State of Uttar Pradesh until a couple of years ago although the state has a significant number of dry latrines and manual scavengers.¹¹⁷

¹¹⁵ eg Integrated Low Cost Sanitation Scheme Guidelines 2012 (modified).

¹¹⁶ Swachh Bharat Mission-Urban Guidelines 2014, para 2.

¹¹⁷ According to Census 2011, there are 3,26,082 dry latrines in the State of UP, and the Socio-economic and Caste Census 2011 found that there are 17390 rural households in the State of Uttar Pradesh with a member working as a manual scavenger. See Socio-Economic Caste Census 2011—Number of Households with Any Member Belonging to PTG (Primitive Tribal Group), LRBL (Legally Released Bonded Labour) and MS (Manual Scavenger) (Rural).

A plausible explanation could be found by linking the issue of poor implementation of laws with caste. It is possible that the caste factor has captured the whole system where the rights of dalits could be violated with impunity and welfare benefits could be denied to them without any question on accountability.¹¹⁸ Therefore, the issue of manual scavenging needs to be understood in the context of structural violence perpetrated through, and power relations enforced through, the caste system and its implications for framing and implementation of laws.¹¹⁹

A worrying factor in this regard is the fact that the 2013 Act might also face similar challenges. The experience from the history of implementation of the 1993 Act does not support an optimistic expectation about the working of the 2013 Act. Therefore, the success of the statutory framework will be contingent upon how strongly the manual scavenging community will assert their rights politically, socially and legally.

The failure or ineffectiveness of the law and policy framework led to a positive outcome in the form of a social movement by the manual scavenging community. Although this is primarily a movement against the caste system and the allocation of menial jobs to dalits, it is also linked to sanitation and the right to sanitation as it is also about humanising the sanitation sector by delinking caste from sanitation. The liberation of sanitation from caste is absolutely essential from a right to sanitation point of view. Caste-based sanitation work that violates constitutional rights and adversely affects environmental quality shall not be allowed to co-exist with the right to sanitation.

There are a few lessons to be learned from the manual scavengers' movement for any rights-based movement including the nascent right to sanitation movement. An important aspect is that laws related to rights of the poor and the marginalised

¹¹⁸ VK Srivastava, 'On Sanitation: A Memory Ethnography' (2014) 44(2) *Social Change* 275, 289. See also Narula (n 88).

¹¹⁹ For a discussion on structural violence, see L Mehta, 'Why Invisible Power and Structural Violence Persist in the Water Domain' in M Oosterom and P Scott-Villiers eds, *Power, Poverty and Inequality* (IDS Bulletin, Vol 47, No 5, 2016) 31.

are unlikely to set in motion on their own. They probably require a very strong push from the right-holders. The manual scavengers' movement also opens up the possibility that social movements can fight for their rights politically and legally at the same time. The example of the *SKA* case shows that in some cases the legal battle empowers the movement and contributes to the realisation of the rights. These aspects are relevant for a nascent right to sanitation movement as it also involves aspects that are peculiar to the poor and the marginalised groups of people such as slum dwellers, dalits and women. Further, the liberation of sanitation from caste must be one of the key focuses of a right to sanitation movement in India. This is probably one discourse that India can contribute to the right to sanitation debate at the international level, as the caste dimension of the right to sanitation is unlikely to be included in the debate at the international level otherwise.

SUMMARY

The link between caste and sanitation work is so strong that it normalises the violence and oppression involved in sanitation work. This explains why the practice of manual scavenging still continues in India despite the adoption of several laws and policies. Unless and until the link between caste and sanitation work is broken, this historical injustice will continue in one form or another. In this context, it is very important to emphasise that building of toilets or modernisation of the sanitation system would not automatically eliminate the practice of manual scavenging.

The manual scavengers' movement coupled with effective implementation of legal provisions indeed gives some hope. The experience of the movement shows that the persistent resistance could send a strong message to those who actively perpetrate manual scavenging as well as to those who are reluctant to carry out their legal duty to prevent it. Further, the existence of strong and clear legal provisions may facilitate the manual scavenging community to fight against caste-based violence and oppression and to assert their rights both legally and politically.

The practice of manual scavenging is a site of violation of several basic human rights including the right to sanitation. The right to sanitation loses its meaning if some of the most marginalised people have to handle human waste manually for their livelihood. While sanitation interventions may not be able to directly impact the demolition of the caste system, they can at least make a significant contribution to the process of de-linking sanitation work from caste, for instance, by providing basic sanitation facilities that would not require individuals to handle human excreta manually.

SANITATION WORK AND THE RIGHT TO SANITATION: LEGAL PROTECTION OF THE RIGHTS OF SEWAGE WORKERS

The term ‘sanitation work’ denotes the work in relation to collection, transport, treatment and disposal of human excreta, domestic wastewater and solid waste. Consequently, the term includes, but is not limited to, the work undertaken by a range of workers, for instance, sweepers, sewage workers, rag pickers, people involved in cleaning of toilets, garbage clearance and disposal, workers transporting waste, workers at landfill sites and disposal units, workers at sewerage treatment plants, and septic tank cleaners. The concept is still evolving and there is no comprehensive legal definition of sanitation work or sanitation workers.

Growing population and fast urbanisation coupled with rising awareness about sanitation and hygiene has led to the expansion of sanitation infrastructure such as toilets and sewage treatment plants. The number of sanitation workers has also increased exponentially. According to an estimate, there are over one million sewage workers in India.¹ The actual number would be much higher if the different categories of sanitation workers are also included.

As the sanitation scenario improves, the need for sanitation workers is also likely to keep on increasing. Nevertheless, sanitation interventions in India have been mainly focusing on building more and more sanitation infrastructure such as toilets and sewage treatment plants. At the same time, little or no attention has been paid to the various issues and concerns, including the rights of sanitation workers.

¹ Praxis, ‘Down the Drain: A Study on Occupational and Health Hazards and the Perils of Contracting faced by Sewerage Workers in Delhi’ (Praxis 2014) 11.

Sanitation workers face a number of issues related to their health, safety and job security. They are one of the worst exploited classes of workers in India. Most of the issues and concerns faced by sanitation workers may not seem directly relevant in the right to sanitation context but they are relevant and unavoidable for various reasons.

First, sanitation workers contribute directly to the realisation of the right to sanitation. Maintenance of public health and cleanliness are significantly dependent upon this workforce. Realisation of the right to sanitation is very difficult, if not impossible, without sanitation workers. This was particularly evident from the recent waste crisis in Delhi due to a strike by sanitation workers.² Second, as sanitation workers are extremely important for the realisation of the right to sanitation, their rights should also be important for the law and policy framework for sanitation. Otherwise, realisation of the right to sanitation will be at the cost of the rights of the workforce behind it. Realisation of the right to sanitation must not be carried out in an exploitative manner. Thus, safe and decent working conditions for sanitation workers must be essential elements of the law and policy framework for sanitation. Third, unsafe working conditions of sanitation workers put them in direct contact with waste or dirt including human excreta. This affects their health and it amounts to the violation of their right to sanitation. Therefore, unsafe working conditions for sanitation workers represent an irony where the right to sanitation of sanitation workers is violated by the same framework that is supposed to ensure the realisation of everyone's right to sanitation.

In this context, this chapter examines the extent to which the issues and concerns of sanitation workers are protected or addressed by the existing law and policy framework. The term 'sanitation workers' encompasses a wide variety of workers and this chapter does not aim to cover all of them. This chapter focuses on sewage workers because sewage work is one of the most dangerous sanitation work and

² V Kant, 'Politics Over Sanitation Strike goes on as Streets Stink in East Delhi' *Hindustan Times* (10 January 2017) <www.hindustantimes.com/delhi-news/politics-over-sanitation-strike-goes-on-as-streets-stink-in-east-delhi/story-jua5AWHuXMCiwmj4SfdJTN.html>.

unsafe working conditions have even led to the death of many sewage workers. Further, the issue of the death of sewage workers, among other issues in this context, has led to significant legal developments through statutory and judicial interventions. As sewage work is almost exclusively absent in rural areas, this chapter, by default, focuses on urban areas. However, the analysis in this chapter is relevant to the rural sanitation context when similar sanitation infrastructure comes into place in rural areas. Further, the issues of safety and social security are relevant to all categories of sanitation workers although the nature and the degree of the requirements may vary.

The first section examines the key issues and concerns of sewage workers. The next two sections analyse the legal responses, which have come from mainly two different legal streams. While the law related to manual scavenging addresses issues related to the health and safety of sewage workers, the existing labour legislation is relevant to the issue of lack of social security. Thus, sections two and three of this chapter analyse these two legal developments respectively along with the relevant case law. The fourth section reiterates the potential and the limitations of the existing legal framework including the judicial directives.

I. SEWAGE WORKERS: ISSUES AND CONCERNS

Issues and concerns of sewage workers could be broadly categorised into two. First, unsafe working conditions lead to a number of diseases, accidents and in some cases even the death of workers. Second, the lack of social security leads to social and economic exploitation by employers including local bodies. Existing laws do not provide adequate protection in this regard to sewage workers. The protection and the benefits of the labour legislation in India are either not applicable to sewage workers or not available to them. This section examines these two categories of issues faced by sewage workers.

A. IMPLICATIONS FOR HEALTH AND SAFETY

Sewage work in India has not yet been fully mechanised. Therefore, workers are required to carry out maintenance work manually. In most cases, if not all, they

undertake this work without any protective gear and safety devices and as a result, they are exposed to hazardous gases and substances.³ In some cases, they are told to work at night to avoid inconvenience to the public and this may pose additional risk to their life and health due to excessive gas formation in sewers as a result of inadequate water supply.⁴ The High Court of Punjab and Haryana has explained the plight of sewage workers in the following words:

It can be noticed in no uncertain terms that the working conditions of those employed for cleaning the underground sewage lines are wholly incompatible with human dignity and hazardous for their health and safety.⁵

Sewage workers are prone to at least 680 ailments.⁶ They have high mortality due to frequent fatal accidents as well as high morbidity due to occupational diseases and frequent exposure to gases and filth.⁷ They are prone to injuries due to solid objects like blades, projecting glasses and other sharp edged or pointed objects. Frequent contact with contaminated water may cause skin diseases. Their eyes may get damaged due to exposure to gases like hydrogen sulphide. They are also vulnerable to a number of health issues such as stomach ailments, musculo-skeletal problems, occupational lung diseases and upper respiratory tract infections, allergies especially of the skin like contact dermatitis, problems related to the eyes like burning, watering and redness, gastrointestinal diseases like diarrhoea and parasitic infections and musculoskeletal problems like fatigue and backache.⁸ The life expectancy of sewage workers has been estimated to be ten years less than the national average due to continuous exposure to an unsafe working environment.⁹

³ *Sewerage Employees Union [Registered], MC Chandigarh v Union of India* Writ Petition No 1983 of 2008, Judgment of 10 December 2008, para 4 (High Court of Punjab and Haryana).

⁴ V Kumar, 'Whose Cleanliness' (2014) 49 (43&44) *Economic and Political Weekly* 13, 14.

⁵ *Sewerage Employees Union* (n 3) para 4.

⁶ The cited report was prepared by a NGO 'Kamdar Swasthya Suraksha Mandal' and referred to in *Praveen Rashtrapal, IRS and Others v Chief Officer, Kadi Municipality* (2006) 3 GLR 1809 (High Court of Gujarat).

⁷ PA Giri et al, 'A Study on Morbidity Profile of Sewage Workers in Mumbai City' (2010) 2(12) *International Journal of Collaborative Research on Internal Medicine & Public Health* 450. See also *Sewerage Employees Union* (n 3) para 4.

⁸ S Gothoskar, 'Too Little, Too Late: Rashtriya Swasthya Bima Yojana in Maharashtra' (2014) 49(2) *Economic and Political Weekly* 25, 27.

⁹ *Praxis* (n 1) 13.

The lack of adequate protection while entering into a sewer canals or while working in a sewer has even led to the death of many sewage workers.¹⁰ One commentator observes that:

The hazardous nature of the work can be assessed by the fact that an estimated 100 workers die every year while entering the confined space at high temperatures, with slippery walls and floor, and in the presence of toxic gases, sharps, chemicals, and insects.¹¹

A fact-finding study conducted by Alternative Law Forum, a non-governmental organisation based in Bengaluru notes that:

There is a complete lack of any safety equipment or any training that is provided to the workers. It is important to note that the contracting out of works of such a hazardous nature further increases the dangers involved, as there is no means to ensure that safety equipment or training is provided to the workers. This has forced workers to come up with their own methods of checking the concentration of noxious gases in the manhole before entering them. After opening the manhole cover, they let it vent a while, then light a match and throw it in. If there's methane, it burns out. Once the fire abates, the worker prepares to enter. In the present instance (of the death of three persons due to asphyxiation) no safety equipment or training was given to the workers.¹²

The consumption of alcohol and tobacco is another problem that adds to their health issues. In the absence of adequate equipment to protect them from dirt and smell, sewage workers generally rely on alcohol and tobacco to overcome the physical and mental inconvenience.¹³ It is also not an uncommon practice for the employers including local bodies to offer sewage workers money to purchase alcohol.¹⁴

¹⁰ eg A Angad, 'Cleaning Lajpat Nagar Sewer, 3 Labourers Die of Suffocation' *The Indian Express* (Delhi 7 August 2017) 5; MR Nair, 'Why Death Continues to Stalk Mumbai's Sewer Workers' *Hindustan Times* (20 February 2017) <www.india-seminar.com/cd8899/cd_frame8899.html>.

¹¹ D Roy, 'Whose City' *Seminar* (August 2013) <www.india-seminar.com/cd8899/cd_frame8899.html>

¹² A Narrain and AK Thiruvengadam, 'Social Justice Lawyering and the Meaning of Indian Constitutionalism: A Case Study of the Alternative Law Forum' (2013-14) 31 *Wisconsin International Law Journal* 525, 539.

¹³ *Sewerage Employees Union* (n 3) para 4.

¹⁴ P Sakthivel, 'Manholes and Safety of Sewage Workers: Experiences from Chennai' (Paper presented at a workshop on 'From Water to Sanitation And Beyond—Legal, Institutional and Policy Dimensions of the Right to Water and Sanitation at Centre for Policy Research, New Delhi, 27–28 July 2012).

B. EXPLOITATION BY LOCAL BODIES AND PRIVATE CONTRACTORS

Sewage workers constitute one of the worst exploited sections of the workforce in India. Even though sewage workers are crucial for the urban sanitation sector, ULBs have gradually reduced the number of workers directly employed by them. Instead, they engage private contractors to carry out the sewage cleaning work. In a way, the strategy of contracting out of sewage work provides an opportunity to ULBs to absolve themselves from legal responsibilities related to the safety and security of sewage workers. For example, in a case concerning compensation for the death of a sewage worker in the course of employment, the concerned ULB submitted before the Court that the deceased worker was not their employee but an employee of a contractor engaged by the ULB. Thus, the safety of the worker was argued as being the responsibility of the concerned contractor.¹⁵ Recently in Delhi when three sewage workers died, the immediate response of the Delhi Jal Board—agency responsible for sewerage services—was that the workers were neither the employees of the Delhi Jal Board nor the employees of private contractors engaged by it.¹⁶ It is also a general practice that the contractors let sanitation workers carry out the work without providing them proper safety equipment or training.¹⁷

Thus, it is not surprising that an overwhelming majority of sewage workers died while they are at work as contract workers, and not as the permanent employees of the concerned ULBs. The High Court of Madras, in *Narayanan*, noted that out of the total 17 sewage workers who died during the period between 2003 and 2008, eleven were contract workers.¹⁸ An independent study underlined that in the

¹⁵ *Delhi Jal Board v National Campaign for Dignity and Rights of Sewerage and Allied Workers and Others* Civil Appeal No 532 of 2011, Judgment of 12 July 2011, para 9 (Supreme Court of India).

¹⁶ Express New Service, 'Delhi Sewer Deaths: Not Our Men, Not Associated with Area Contractor, Says DJB' *The Indian Express* (Delhi 7 August 2017) 5.

¹⁷ *Praveen Rashtrapal* (n 6).

¹⁸ *A Narayanan v The Chief Secretary, Government of Tamil Nadu* Writ Petition No 24403 of 2008, Judgment of 20 November 2008, para 16 (High Court of Madras).

State of Gujarat, out of 14 sewage cleaners who died in drains between March 2006 and August 2007, 12 were working for private contractors.¹⁹

Further, the contractual nature of the work leads to denial of rights. For example, in the case of tragedies like death, the dependants either do not get any compensation at all or have to run from pillar to post to get compensation. ULBs refuse to take legal responsibility on the pretext that they have privatised the sewage work. In most cases, contractors also do not provide adequate compensation.²⁰ Thus, way back in 1996, the NCSK recommended the abolition of the system of contracting out of all sanitation work including sewage work by ULBs.²¹ Nevertheless, the practice continues probably because ULBs do not consider it important to maintain a permanent workforce of sewage workers.

Sewage workers are poorly paid for their work. A worker employed by a contractor gets approximately 4000–7000 rupees per month.²² Generally they do not get any social security benefits.²³ Salary increments and welfare benefits are unheard of in this sector.²⁴ In some cases, workers engaged by contractors do not get their full salary because the number of holidays and Sundays are deducted from the actual salary. There is no sanctioned leave for sewage workers and they will lose their salary if they have to take leave even when it is due to an injury sustained during work.²⁵

The tendency to classify sewage work as unskilled work that does not require specific educational qualification or training is one of the reasons for the continuing exploitation of sewage workers.²⁶ This tendency coupled with the system of caste based allocation of sanitation work makes sewage workers one of

¹⁹ J Murphy, 'A Toxic Mix? Comparative Efficiency and the Privatization of Sanitation Services in India' (2010) 30 Public Administration and Development 124, 131.

²⁰ Kumar (n 4) 14.

²¹ National Commission for Safai Karmacharis (NCSK), Second Annual Report 1995-96 (NCSK 1996) 90.

²² Praxis (n 1) 25.

²³ B Harris-White, 'The Politics of Waste Management' *The Hindu* (7 October 2015) <www.thehindu.com/opinion/lead/the-politics-of-waste-management/article7731264.ece>.

²⁴ Praxis (n 1) 24.

²⁵ *ibid* 44, 45.

²⁶ *ibid* 43.

the most neglected and the worst exploited labour classes in India. Ironically, the government, most importantly ULBs, has been actively exploiting this vulnerable class to fulfil its legal duties related to sanitation. From a right to sanitation point of view, the law and policy framework for sanitation has been violating the right to sanitation and other rights of sewage workers in order to realise the right to sanitation of the public in general.

II. SAFE WORKING ENVIRONMENT: EVOLVING LAWS AND PERSISTING NON-IMPLEMENTATION

Rules regulating the working environment of sewage workers have evolved in the last couple of decades. Sewage workers' union and other supporters initiated the first significant step in this regard when they approached the higher judiciary in India. This has led to the evolution of certain rules to ensure the safety of sewage workers. The rules evolved by the higher judiciary have been further codified and strengthened by the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013 (2013 Act) and the Prohibition of Employment as Manual Scavengers and their Rehabilitation Rules 2013 (2013 Rules).

A. PROHIBITION OF UNPROTECTED MANUAL ENTRY INTO SEWERS

The entry of sewage workers into sewers without adequate protection and the consequences such as deaths, accidents and diseases are probably the most important issues in the context of sewage work from the point of view of the right to sanitation and other human rights. One of the major factors that make this possible is the absence of an explicit legal prohibition on unprotected manual entry into sewers.

In effect, the unprotected entry of human beings into sewers amounts to manual scavenging. The practice of manual scavenging has been prohibited explicitly at least since the adoption of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993 (1993 Act). Therefore, unprotected sewage work should be considered legally prohibited under the 1993 Act. However, the 1993 Act was hardly ever applied to sewage workers. In fact,

the 1993 Act was poorly implemented even in the most obvious case of manual scavenging in the context of dry latrines, let alone the possibility of a purposive interpretation to extend its application to sewage workers.

The 1993 Act defines the term ‘manual scavenging’ narrowly in the context of dry latrines.²⁷ The Government of India and various state governments conveniently followed this narrow definition and consequently other sanitation-related practices, such as sewage cleaning were deliberately kept out of the purview of the 1993 Act. For instance, in a case against the Indian Railways before the High Court of Delhi, the Indian Railways had been consistently relying on the definition of manual scavenging under the 1993 Act to prevent the application of the law to other practices such as carrying of human excreta in wheeled barrows or buckets, or manual removal of excreta and other waste from drains.²⁸

The legal vacuum that existed as a result of the restricted interpretation of the 1993 Act led sewage workers, their unions and their supporters to approach the higher judiciary. From the mid-1990s, a few public interest litigations were filed in some of the high courts and the Supreme Court of India. Judicial intervention led to the emergence of probably the first explicit legal response to the issue of unsafe entry of sewage workers into sewers.

In *Praveen Rashtrapal*, the High Court of Gujarat held that human entry into sewers shall not be allowed unless it is absolutely necessary.²⁹ The Court also went to the extent of fixing civil and criminal liability on the responsible officers and civic bodies in case an officer insists on the entry of sewage workers into sewers without adequate protection. It was also directed that the entry of sewage workers into sewers must be based on an order in writing.³⁰ In *Narayanan*, the High Court of Madras adopted a progressive interpretation of the 1993 Act and

²⁷ According to the 1993 Act, s 2(j): “manual scavenger” means ‘a person engaged in or employed for manually carrying human excreta’. The term “dry latrine” is defined as ‘a latrine other than a water-seal latrine’.

²⁸ S Khanna, Manual Scavenging Cases (Paper presented at a workshop on ‘From Water to Sanitation And Beyond—Legal, Institutional and Policy Dimensions of the Right to Water and Sanitation at the Centre for Policy Research, New Delhi, 27–28 July 2012).

²⁹ *Praveen Rashtrapal* (n 6) para 8.

³⁰ *ibid* para 8.4.2.

held that unprotected sewage work amounts to manual scavenging. This led to the logical conclusion of issuing a directive banning the entry of workers into manholes without safety gear and a declaration that such entry is a violation of the 1993 Act.³¹ The Supreme Court of India in *Safai Karmachari Andolan* has categorically held that entering sewer lines without safety gear should be made a crime even in emergency situations.³²

The higher judiciary has evolved the rule prohibiting the unprotected human entry into sewers. However, the prohibition is not absolute in nature. The higher judiciary has prescribed the standard of ‘exceptional situations’ or ‘unavoidability’ to justify human entry. However, the court added adequate safety measures as a pre-condition to allow human entry even in such ‘exceptional circumstances’. Thus, the law evolved in this regard is clear. Human entry is generally prohibited and it could be allowed only in exceptional circumstances after providing adequate safety gear to protect the life and health of the concerned workers. In *Narayanan*, the High Court of Madras provided some guidance as to the nature of ‘exceptional circumstances’ by citing illustrative examples such as removal of blocks where mechanical equipment could not be put into operation, interlinking of a newly built sewer lines with an existing line and removal of submersible pump sets fixed at the bottom of the suction wells for repair or replacement.³³

The enactment of the 2013 Act has further concretised the prohibition of unprotected manual sewage work. The 2013 Act addresses one of the major criticisms of the 1993 Act, that is, the exclusion of sanitation workers in general and particularly sewage workers from the scope of the law on manual scavenging. The 2013 Act explicitly prohibits engaging or employing any person for hazardous cleaning of a sewer or a septic tank.³⁴ Hazardous cleaning for this purpose means manual cleaning of a sewer or a septic tank without protective gear

³¹ *Narayanan* (n 18) para 24.

³² *Safai Karmachari Andolan v Union of India* (2014) 11 SCC 224, 237 (Supreme Court of India).

³³ *Narayanan* (n 18) para 24.

³⁴ Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013, s 7.

and other cleaning devices.³⁵ Further, it is the legal duty of an employer to ensure the safety of the workers while they are at work.³⁶ The 2013 Rules have also reiterated the prohibition by elaborating the exceptional circumstances in which human entry may be allowed with protective gear and safety devices.³⁷

Thus, the law to address the issue of health and safety of sewage workers has been progressively evolved. The developments in this regard began with the initiative and struggle of sewage workers, their union and other supporters leading to a few public interest litigations in different high courts and the Supreme Court of India. The higher judiciary sympathetically considered their issues and concerns and took initiatives to protect their life and health. This development eventually culminated in explicit statutory provisions with the adoption of the 2013 Act and the 2013 Rules.

B. EXPANDING THE REGULATION TO ENSURE SAFETY

The regulatory standards that have evolved through case law are general in nature. For instance, while the High Court of Madras in *Narayanan* prescribed the standard of ‘necessary safety gadgets’,³⁸ the Supreme Court of India in *Delhi Jal Board* used the term ‘modern protective equipments’.³⁹ The High Court of Gujarat in *Praveen Rashtrapal* provided more details of the precautions to be taken by the employer. The Court provided an illustrative list of precautionary measures, which included the duty to ensure that there is no poisonous gas present inside the sewage canal, the duty to provide safety equipment such as oxygen mask, helmet, gumboots, air blower and torch, and the duty to ensure that the sewage worker is trained to use the gadgets.⁴⁰ This is probably a limitation of ‘law-making’ by the judiciary as the process is constrained by the limited

³⁵ *ibid* s 2(1)(d).

³⁶ *ibid*.

³⁷ Prohibition of Employment as Manual Scavengers and their Rehabilitation Rules 2013, r 3(1).

³⁸ *Narayanan* (n 18) para 24.

³⁹ *Delhi Jal Board* (n 15) para 5.

⁴⁰ *Praveen Rashtrapal* (n 6) para 8.4.

information available before the court as admitted by the High Court of Punjab and Haryana in *Sewerage Employees Union*.⁴¹

The 2013 Rules seek to fill this regulatory vacuum. They follow a precautionary approach insofar as the safety of the workers is concerned. Thus, the 2013 Rules provide a list of protective gear and safety devices to prevent or control the exposure of workers to hazardous substances and gases.⁴² The 2013 Rules also provide a detailed list of precautions to be taken by employers before workers are asked to enter a sewer and while they are at work.⁴³ The precautionary measures and the equipment prescribed under the 2013 Rules must be read with the related provisions in the 2013 Act. The 2013 Act clearly provides that it is the duty of the concerned local body to ensure the use of appropriate technology to prevent manual cleaning of sewers.⁴⁴ The Act also provides that it is the duty of the state government to facilitate the use of technology by providing financial assistance and incentives.⁴⁵

The 2013 Act provides for a multi-level institutional mechanism to ensure the implementation of the Act and the 2013 Rules. It empowers the state government to appoint Inspectors to check and report the violation of the Act, which includes unprotected entry into sewers. While the appointment of Inspectors is not mandatory, the Act prescribes mandatory institutions at different levels. It envisages Vigilance Committees at the district and sub-division levels mainly for aiding, advising and overseeing the implementation of the law.⁴⁶ It also requires state governments and the Union Government to set up State Monitoring Committees and the Central Monitoring Committee respectively.⁴⁷ Both the state level and the union level monitoring committees have overall supervision and monitoring duties.⁴⁸ At the same time, the State Monitoring Committees are

⁴¹ *Sewerage Employees Union* (n 3) para 10.

⁴² Prohibition of Employment as Manual Scavengers and their Rehabilitation Rules 2013, r 4.

⁴³ *ibid* r 6 & 7.

⁴⁴ Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013, s 33(1).

⁴⁵ *ibid* s 33(2).

⁴⁶ *ibid* ss 24 & 25.

⁴⁷ *ibid* ss 26 & 29.

⁴⁸ *ibid* ss 27 & 30.

required to periodically report to the Central Monitoring Committee on the implementation of the law.⁴⁹ The institutional mechanism could be seen as a continuation of, or inspired by, some of the judicial directives, which required the government and ULBs to establish safety committees and manhole departments to ensure the safety of sewage workers.⁵⁰

C. THE CONTINUING UNSAFETY AND DISREGARD FOR LAW

A systematic analysis of the implementation of the 2013 Act and the judicial directives is yet to be conducted. However, some of the available evidences indicate that the issue of safety continues to be a major concern for sewage workers. Thus, it appears that the law and policy framework for sanitation continues to violate the right to sanitation and other rights of sewage workers. The frequent media reports on death of sewage workers inside sewers are a serious concern and seem to indicate that the local bodies and the contractors continue to neglect the safety norms laid down in the 2013 Act and the 2013 Rules.⁵¹ The disregard for law in this regard has been well recognised including by the higher judiciary. For instance, the High Court of Madras noted that sewage workers had met with accidents in violation of the interim directives of the Court.⁵² The Supreme Court of India also noted similar issues in the *Delhi Jal Board* case.⁵³

The situation does not seem to have improved much even after the adoption of the 2013 Act and the 2013 Rules. Thus, in 2015-16, the manual scavenging community organised a countrywide procession (Bhim Yatra) to protest against non-implementation of the law. According to Safai Karamchari Andolan, out of the total sewer and septic tank deaths, compensation was provided only in less

⁴⁹ *ibid* s 28.

⁵⁰ *eg Praveen Rashtrapal* (n 6) para 8.4.6; *Suo Motu v Secretary* Special Leave Application No 13911 of 2008, Judgment of 14 March 2011, para 3.14 (High Court of Gujarat).

⁵¹ *eg Angad* (n 10).

⁵² *A Narayanan* (n 18) para 21.

⁵³ *Delhi Jal Board* (n 15) para 6.

than three per cent of the cases.⁵⁴ An on-going case before the High Court of Delhi further exemplifies the lethargy and insensitivity of the government in this regard. The High Court of Delhi, more than once, reminded with displeasure the Government of Delhi of its failure to fulfil its duties under the 2013 Act, for instance, by not conducting the survey and by not setting up the institutional mechanisms envisaged under the Act.⁵⁵ This is not an isolated incident because similar instances have been reported from other states as well.⁵⁶ Recently, in the aftermath of the death of ten sewage workers in Delhi within a period of five weeks, the Union Government explicitly blamed state governments for not implementing the 2013 Act and the 2013 Rules.⁵⁷

The link between caste and sanitation work has also been cited as one of the reasons for the poor implementation of statutes and judicial directives.⁵⁸ An overwhelming majority of sewage workers are dalits. The traditional manual scavenging community continues to engage in sewage work due to the non-availability of other options. This probably explains the myopia towards the issues of sewage workers of the law making and law implementing agencies, which are predominantly constituted of upper caste people.

The regulatory framework for ensuring the safety of sewage workers has progressively evolved through case law and statutes. At the same time, the implementation of laws continues to be a challenge. This is one area where the

⁵⁴ Safai Karmachari Andolan, Bhim Yatra <<http://safaikarmachariandolan.org/Bhim-Yatra.html>>. See also Safai Karamchari Andolan, 'Bhim Yatra' (2016) 51 (1) Economic and Political Weekly 4.

⁵⁵ *National Campaign for Dignity and Rights of Sewerage and Allied Workers v MCD and Others* Writ Petition (Civil) No 5232 of 2007, Order of 1 February 2017 (High Court of Delhi). See also PTI, 'HC Pulls up Delhi Govt for Lack of Rules on Manual Scavenging' *The Indian Express* (14 December 2016) <<http://indianexpress.com/article/india/hc-pulls-up-delhi-govt-for-lack-of-rules-on-manual-scavenging-4427192/>>.

⁵⁶ eg S Senthilir, 'Manual Scavenging: An Indelible Blot on Urban Life' *The Hindu* (25 March 2017) <www.thehindu.com/news/national/tamil-nadu/an-indelible-blot-on-urban-life/article17664714.ece>.

⁵⁷ Express News Service, 'Manual Scavenging: Centre Slams States for Not Implementing Law' *The Indian Express* (Delhi 31 August 2017) 6.

⁵⁸ S Anand, 'Deaths in the Drain' *The Hindu* (14 April 2014) <www.thehindu.com/opinion/op-ed/deaths-in-the-drains/article5868090.ece>. See also S Tam, 'Coprolology and Caste: The Status of Sewerage in Ahmedabad, India' (The Roberta Buffett Center for International and Comparative Studies, Northwestern University, Working Paper No 12-002, February 2012).

policy framework for sanitation could have contributed significantly by taking the issue of the safety of sewage workers seriously while implementing sanitation interventions. For instance, a part of the money allotted under the SBM-Urban could have been allotted to mechanise sewage work and to provide adequate safety gear and equipment to workers.

However, the policy framework has not taken into consideration the existing statutes and judicial directives. For instance, the SBM focuses almost exclusively on improving access to sanitation for everyone and neglects the issue of the safety of sewage workers. The NUSP is slightly progressive in terms of its approach towards sewage workers. It recognises the occupational hazards faced by sewage workers as an issue to be addressed through the policy framework for sanitation.⁵⁹ However, the operative part of the policy focuses overwhelmingly on building sanitation infrastructures such toilets and sewage treatment plants, and little on the issue of their maintenance. The section on operation and maintenance is silent in respect of sewage workers in general and focuses only on the need for maintenance of the system.⁶⁰ Sanitation policies at the state level do not seem to be different. For instance, the draft Rajasthan Rural Sanitation Policy is silent on the rights of sanitation workers including sewage workers.⁶¹ To put it differently, the issues and concerns of sewage workers remain a low priority of sanitation interventions when compared to its primary focus on facilitating access to sanitation.

III. EXTENDING SOCIAL SECURITY PROTECTION UNDER LABOUR LAWS

The law and policy developments pertaining to sanitation focus on the health and safety aspects of sanitation work in general and sewage work in particular. At the same time, the issues of exploitation and lack of social security have received comparatively less or no attention. In a context where the law and policy

⁵⁹ National Urban Sanitation Policy 2008, para 3.

⁶⁰ *ibid* para 4.5.

⁶¹ Government of Rajasthan, Rural Sanitation and Hygiene Policy 2011.

framework for sanitation is silent on these issues, this section examines to what extent the issues have been addressed under the existing labour legislation. The effectiveness or the applicability of the labour legislation to sewage workers is relevant in the right to sanitation context in terms of assessing the extent to which the framework for realising the right to sanitation is exploitative in nature.

A. LABOUR LAWS: RELEVANCE AND APPLICABILITY

Laws related to labour rights and labour welfare are the other regime, which is, in principle, relevant in the context of the social security of sewage workers. Laws to ensure rights and promote the welfare of labourers have a long history in India. There are a number of legislation to guarantee safety, health, maternity benefit and employment security.⁶² Some of the labour legislation are particularly relevant to sewage workers. In a context where a majority of sewage workers are contract employees, the Contract Labour (Regulation and Abolition) Act 1970 is an important statute. Safety of contract labourers is the duty of the concerned contractors under this law. For example, it is the duty of the contractor to make available ‘first-aid facilities’ to contract labourers during all working hours.⁶³ Similarly, the Employees State Insurance Act 1948 provides for better health conditions and insurance benefit to workers. The benefits under this law are also available to contract workers and casual workers.⁶⁴

However, these laws have limited application to sewage workers. Like many other laws relating to labour rights such as the Factories Act 1948, this law is applicable to establishments of specific nature and size. For instance, the Contract Labour (Regulation and Abolition) Act 1970 is applicable to establishments with twenty or more workers.⁶⁵ Therefore, this law is not relevant to sewage workers unless local bodies ensure that they contract out sewage work to establishments that come under the purview of the existing labour laws such as the Contract Labour

⁶² eg Workmen’s Compensation Act 1923; Employees’ State Insurance Act 1948.

⁶³ Contract Labour (Regulation and Abolition) Act 1970, s 19.

⁶⁴ Employees State Insurance Act 1948, ss 49, 50 and 51. See also *Regional Director, Employees State Insurance Corporation v South India Flour Mill (Pvt) Ltd* (1986) 3 SCC 238, 243–244 (Supreme Court of India).

⁶⁵ Contract Labour (Regulation and Abolition) Act 1970, s 1(4)(a).

(Regulation and Abolition) Act 1970. Similarly, the Employees State Insurance Act 1948 is applicable only to factories unless the state government has used its statutory power to extend the application of the law to other establishments.⁶⁶

The non-application of labour laws generally to the workers in the unorganised sector led to the enactment of the Unorganised Workers' Social Security Act, 2008 (UWSS Act). The UWSS Act per se does not define any rights of the workers in the unorganised sectors. Instead, it requires the Union Government to adopt schemes and policies to ensure social security to unorganised workers.⁶⁷ The UWSS Act also provides a list of such schemes in the annexure and the Union Government has the power to revise the list from time to time.⁶⁸ Some of the existing programmes recognised under the UWSS Act are also relevant to sewage workers. For instance, the Rashtriya Swasthya Bima Yojana provides medical insurance to 13 categories of unorganised workers including sanitation workers.⁶⁹ One of the major issues with the UWSS Act is that the benefits depend upon various programmes and schemes adopted by the Union Government. In reality, there appears to be no significant development to provide social security to unorganised workers in general.⁷⁰

Thus, the protection of labour legislation continues to be, by and large, unavailable to sewage workers. Overall, there is no comprehensive law to ensure social security to sewage workers. The existing laws either face the issue of inadequate implementation or are not applicable to sewage workers.

B. MAKING AVAILABLE THE PROTECTION THROUGH JUDICIAL DIRECTIVES

The non-application of the existing labour laws has been mitigated at least to some extent through judicial interventions. The higher judiciary has addressed the

⁶⁶ Employees State Insurance Act 1948, s 1(1)(4).

⁶⁷ Unorganised Workers' Social Security Act 2008, s 3(1).

⁶⁸ *ibid* schedule 1.

⁶⁹ *ibid*.

⁷⁰ K Chamaraj, 'An Endless Wait for Social Security' *India Together* (17 February 2016) <<http://indiatogether.org/an-endless-wait-for-social-security-human-rights>>.

issues of job insecurity and exploitation in some cases. Certain protection available under the existing labour laws have been made available to sewage workers through judicial directives. In *Delhi Jal Board*, the Court made it clear that the employer has no authority to terminate the service of the workers during periods of illness and such period should be treated as if the worker was on duty.⁷¹ The Court further extended other labour benefits, for instance, provident fund and gratuity, to sewage workers and entrusted the State with the duty to ensure that sewage workers get all these benefits and entitlements.⁷²

The contractual nature of sewage work has been a key reason for the exploitation of sewage workers by both ULBs and private contractors. The High Court of Punjab and Haryana took note of this issue in *Praveen Rashtrapal* and directed the civic bodies to discontinue the practice of engaging contractors for sanitation work in general.⁷³ In *Narayanan*, the High Court of Madras did not go to the extent of directing the discontinuation of the practice of contracting, but made it clear that the duty of the government remains even in cases where the sewage work has been given to contractors.⁷⁴ The Supreme Court of India strengthened this legal position by explicitly linking the duty of the State with the Constitution of India. Thus, in *Delhi Jal Board*, the Supreme Court of India held that:

The State and its agencies/instrumentalities cannot absolve themselves of the responsibility to put in place effective mechanism for ensuring safety of the workers employed for maintaining and cleaning the sewage system...The State and its agencies/instrumentalities or the contractors engaged by them are under a constitutional obligation to ensure the safety of the persons who are asked to undertake hazardous jobs.⁷⁵

As previously mentioned, the NCSK had recommended the abolition of the contract system for sanitation work in the mid-1990s to avoid the exploitation of sewage workers.⁷⁶ The cases cited above highlight that the government has neglected the recommendations of the NCSK.

⁷¹ *Delhi Jal Board* (n 15) para 5.

⁷² *ibid.*

⁷³ *Praveen Rashtrapal* (n 6) para 8.3.

⁷⁴ *A Narayanan* (n 18) para 24(iii).

⁷⁵ *Delhi Jal Board* (n 15) para 24.

⁷⁶ National Commission for Safai Karamcharis (n 21) 90.

The issue of lack of social security for sewage workers and their dependents has been the focus of attention in some cases. Sewage workers and their dependents do not receive adequate compensation in cases of occupational diseases or death, and in some cases they do not receive any compensation at all. One of the challenges in this regard is the contractual nature of sewage work. In most cases, ULBs refuse to take the responsibility to provide compensation by citing the fact that sanitation work has been privatised. ULBs generally follow the position that it is the responsibility of the concerned contractors to provide compensation.⁷⁷ Contractors also walk away from their responsibility or provide a meagre sum. In most cases these issues escape legal or social scrutiny or discussion apparently due to the marginalised status of sewage workers.

Litigation and the judiciary's response seem to have helped to the extent that they have brought sewage workers within the scope of the protection of some of the labour legislation. In *Narayanan*, the High Court of Madras categorically held that the issue of compensation to sewage workers or their dependents should be addressed under the provisions of the Workmen Compensation Act 1923.⁷⁸ The Court also held that it is the duty of the concerned government agencies even in the case of contract workers to provide compensation to workers or their dependents and such agencies may get themselves indemnified by the contractors.⁷⁹

The Supreme Court of India took a similar view subsequently in *Delhi Jal Board*. It was held that compensation should be provided in accordance with the Workmen Compensation Act 1923.⁸⁰ The Supreme Court of India further held that in case of death, immediate ex-gratia payment of rupees one lakh should be provided.⁸¹ In this case the Court also discussed the issue of reasonable compensation and held that the amount awarded by the High Court of Delhi (rupees 1.5-2.25 lakh) was not reasonable and held that the compensation should

⁷⁷ eg *Delhi Jal Board* (n 15) para 9.

⁷⁸ *A Narayanan* (n 18) para 24 (vi).

⁷⁹ *ibid.*

⁸⁰ *Delhi Jal Board* (n 15) para 5.

⁸¹ *ibid* para 5.

be at least rupees five lakh.⁸² Recently, the Supreme Court of India brought clarity to the issue of compensation in cases of death of sewage workers while at work. The Supreme Court of India, in the *SKA case*, held that ‘entering sewer lines without safety gears should be made a crime even in emergency situations. For each such death, compensation of Rupees 10 lakhs should be given to the family of the deceased’.⁸³

There are three important contributions made by litigation. First, the courts have upheld the right of sewage workers to entitlements such as provident fund and gratuity. Second, the courts have clarified the applicability of an important labour legislation to sewage workers. Thus, compensation to sewage workers or their dependents in cases of occupational diseases or death has been brought under the purview of the Workmen Compensation Act 1923. Third, the courts have fixed the amount of compensation (rupees 10 lakh) in case of death of sewage workers while they were at work inside the sewers.

The judicial directives mentioned above have positive and negative elements. On the positive side, these are progressive steps when compared to the utter neglect faced by sewage workers. On the negative side, these directives are still far from ensuring the right to sanitation and other rights of sewage workers because it may be difficult for sewage workers to go to a high court or the Supreme Court of India to claim their rights. Therefore, the existing law and policy framework relevant to sewage workers seems inadequate to protect their rights. This situation necessitates a statutory framework that addresses all the important issues and concerns of sanitation workers including sewage workers with the necessary institutional mechanism to ensure the implementation of the law.

⁸² *ibid* para 30.

⁸³ *Safai Karamchari Andolan* (n 32) 237.

IV. EVOLVING LAWS, IMPLEMENTATION CHALLENGES AND IMPLICATIONS FOR RIGHTS

The development and expansion of sanitation infrastructure have been a major focus of the law and policy framework for sanitation particularly in the urban sanitation context. The development of urban sanitation in this regard follows a particular pattern where technological developments and investment predominantly focus on expansion and modernisation of the infrastructures related to sanitation, such as wastewater treatment plants and the sewerage network. At the same time, there has been little focus on issues related to the maintenance of the sanitation infrastructure including the rights of sewage workers. This neglect dates back to the colonial period and the situation has not changed significantly even after independence.⁸⁴

One of the major reasons for the historical neglect of sewage workers is the link between caste and sanitation work in India. An overwhelming majority of the sanitation workers including sewage workers in India are dalits.⁸⁵ The caste system is a vicious circle where the traditional manual scavenging communities are unable to find alternative work and sanitation work apparently is the only occupation available to them to secure their livelihood. The sanitation sector in India has been exploiting the vulnerability of dalits particularly by engaging them to dispose human excreta and to carry out the maintenance of sewers.

While the development of the sewerage system during the colonial period was expected to eliminate the practice of manual scavenging, the neglect of the maintenance side of the sewerage system led to the engagement of traditional manual scavenging communities to maintain the new sewerage system.⁸⁶ This

⁸⁴ Tam (n 58); S Chaplin, 'Indian Cities, Sanitation and the State: the Politics of the Failure to Provide' (2011) 23(1) *Environment and Urbanization* 57; V Prashad, 'The Technology of Sanitation in Colonial Delhi' (2001) 35(1) *Modern Asian Studies* 113.

⁸⁵ A study on sewerage workers in Delhi revealed that 67 per cent of the total sewerage workers belong the Balmiki caste, a caste group that occupies the lowest position in the graded hierarchical caste order and is traditionally identified with menial jobs including sanitation work. See Praxis (n 1) 22. See also Harris-White (n 23).

⁸⁶ Tam (n 58).

precedent conveniently continues.⁸⁷ Thus, there is no significant difference between the colonial government and the democratically elected governments in independent India insofar as their approach to sewage workers is concerned. The sanitation sector in colonial India and in independent India has equally exploited sewage workers and thus contributed to the reinforcement of the link between caste and sanitation work.

Unsafe working environment, social oppression and economic exploitation together pushed the sewage workers further and further away towards the margins of society. Thus, susceptibility to diseases, occurrence of deaths in sewers and the lack of social security of sewage workers have never received adequate attention from a law and policy point of view. While the government did not proactively take measures to address the issues and concerns of sewage workers, in some cases, it actively violated their rights by engaging them to carry out the work in unsafe conditions.

The unsafe working condition of sewage workers raises concerns from a right to sanitation point of view. First, the unsafe working environment leads to severe implications for the health of the workers such as occupational diseases, accidents and injuries. Death of workers inside a sewer due to poisonous gases is also not uncommon. This scenario is diametrically opposite to one of the key elements of the right to sanitation, that is, the protection of health from human excreta. The fact that sewage workers are exposed to human excreta or they are in direct contact with sewage due to inadequate safety gear and devices amounts to a violation of their right to sanitation.

Second, the unsafe working conditions of sewage workers expose an irony in the sanitation sector in India. The sewerage system is one of the several initiatives, and the work of sewage workers contributes significantly, towards the realisation of the right to sanitation. The neglect of safety issues and concerns of sewage workers by the law and policy framework for sanitation thus shows the irony of

⁸⁷ *ibid*; Prashad (n 84).

violation of the right to sanitation among other rights of sewage workers who work for the realisation of the right to sanitation of the general public.

Third, the maintenance of sewers contributes to the realisation of the right to sanitation. Sewage workers play a crucial role in this regard particularly in the urban sanitation context and therefore, they are part of the institutional framework for realising the right to sanitation. The government has been exploiting this workforce for the realisation of the right to sanitation, for instance, by not ensuring job security, decent remuneration and other standard labour benefits that are available to other labourers or employees. Thus, the realisation of the right to sanitation in many urban areas in India so far has been executed at the cost of several human rights including the right to sanitation of sewage workers. Violation of human rights of one of the most marginalised classes of people to realise the human rights of others is unacceptable from a legal point view.

There has not been any concerted effort to address these issues through a statutory framework. At the same time, there are a few statutes addressing different aspects of the issues and concerns of sewage workers. Legal responses to some of the issues have come from the higher judiciary. Thus, the existing legal framework is a complex mixture of statutes and case law.

Public interest litigation provided an opportunity to sewage workers to raise the question of their rights. It also gave an opportunity to the higher judiciary in India to assess the gaps and the lack of clarity in law to protect the rights of sewage workers. Thus, the higher judiciary went to the extent of making law to fill the legal vacuum. This is, for example, reflected in almost all judgements discussed above wherein the judiciary without any shadow of doubt has underlined the duty of the government as well as private employers to take necessary measures to ensure the safety of sewage workers. In some cases, the courts went a step ahead and prescribed a list of safety gear and devices that are to be provided by the employers.

Although India has a long history of legal protection of labour rights, the benefit of this protection was confined to workers in the organised sector such as workers

in factories. In the case of sewage workers, either these laws were not applicable or they were not effectively implemented. The judiciary took note of this issue and categorically emphasised the availability of the protection of at least some of the existing labour legislation to sewage workers—the Workmen Compensation Act 1923 and the Contract Labour (Regulation and Abolition) Act 1970.

Further, the judiciary played an important role in addressing the issue of compensation in cases of occupational diseases and death. Instead of leaving it to the discretion of the employers to decide the amount of compensation, the judiciary brought the issue of compensation within the scope of the Workmen Compensation Act 1923. The Supreme Court of India has settled the issue subsequently by fixing the amount of compensation as rupees 10 lakh (one million) in case of sewer deaths.

The higher judiciary has contributed significantly to the recognition of the rights of sewage workers. Public interest litigation gave sewage workers an opportunity to force the government to admit in some cases, and provide an answer in some other cases for, their myopic approach towards the blatant violation of the rights of sewage workers. The cases gave the workers an opportunity to force the government to fulfil its legal and constitutional obligations.

However, the law as developed by the higher judiciary in the last two decades is not an alternative to a comprehensive statute for various reasons. First, several of these cases are in the specific context of urban sanitation and addressed to a specific urban local body. The applicability of these directives to other contexts or jurisdiction of other local bodies is doubtful. Second, even in case of the general directives issued by courts, the implementation record has not been impressive. For example, sewer deaths have occurred even when the court directives are in force.⁸⁸

Third, different high courts have appreciated or assessed the issue differently. This is clear from the fact that different directives in different states led to

⁸⁸ eg *A Narayanan* (n 18) para 21.

different results and in some cases contradictory results. For example, in *Ayyaswami*, the High Court of Madras referred to the decision of the Supreme Court of India in *Safai Karmachari Andolan* while deciding the issue of compensation.⁸⁹ At the same time, the High Court did not follow the amount of compensation (rupees 10 lakh) fixed by the Supreme Court of India for the dependents of the workers who die in sewers in the course of work. Instead, the High Court fixed a lesser amount (rupees five lakh).⁹⁰

The issue of inconsistency among and incoherence in different court directives probably reflects the limitations of addressing the issue of the rights of sewage workers through judicial directives. It highlights the issue of non-availability of reliable data and information before the court in order to decide the matter. It also highlights an inherent limitation of the judiciary, that is, the directives of the court are generally applicable to the parties to a dispute or to the specific context of the dispute. Therefore, a statutory framework that applies across different contexts and administrative jurisdictions is essential to ensure the realisation of the rights of sewage workers.

A relatively comprehensive effort from the legislators came as late as in 2013. As opposed to the conventional approach of focusing on dry latrines and the associated practice of manual scavenging, the 2013 Act expanded the scope of the law related to manual scavenging and brought sewage work and the work of cleaning septic tanks under its purview. Thus the 2013 Act and the 2013 Rules together prescribe a series of measures to be taken by employers to ensure the safety of sewage workers. At the same time, the issue of lack of social security has not been addressed under this law. Therefore, case law still continues to be the major source of law insofar as the issue of lack of social security is concerned.

Legal responses in terms of framing or developing rules have been progressively evolving in the last two decades. However, a key question is whether the law has been effectively leading to the realisation of the rights of sewage workers

⁸⁹ *P Ayyaswami v The Chief Secretary* Writ Petition No 25717 of 2012, Order of 6 March 2015 (High Court of Madras).

⁹⁰ *ibid* para 10.

including their right to sanitation. Some of the available evidence like newspaper reports, responses of the manual scavenging community and the ongoing sewage workers' litigation seem to lead to the conclusion that the government has not yet started serious efforts to implement the law.

While the legal framework recognises, at least to some extent, the rights of sewage workers, the policy framework continues to ignore them. The policy framework on sanitation, for instance the ongoing SBM, almost exclusively focuses on improving access to sanitation. It overlooks the crucial workforce that makes access to sanitation a sustainable reality.

SUMMARY

Legal protection of the rights of sewage workers has been progressively evolved first through judicial interventions and subsequently through statutes such as the 2013 Act. Thus, the issue of the safety of sewage workers has received significant legal attention leading to the evolution of important legal norms—the prohibition of the manual entry into sewers without adequate safety gear and devices. At the same time, there has been little progress insofar as the issue of lack of social security for sewage workers is concerned.

While law in this regard is progressively evolving, the policy framework for sanitation has been focusing exclusively on the availability of sanitation facilities to everyone. The policy framework has neglected the issues and concerns of sewage workers. At the same time, the sanitation sector, particularly the urban sanitation sector, continues to use sewage workers without any regard to their safety and welfare. Thus, the existing framework for sanitation in India exhibits an uncomfortable irony wherein it aims to realise the right to sanitation of a vast majority of population and pays little attention to the rights, including the right to sanitation, of the workforce that make this goal a reality.

CONCLUSION: ENSURING A BROAD CONCEPTUALISATION AND EFFECTIVE IMPLEMENTATION OF THE RIGHT TO SANITATION

The higher judiciary in India has recognised the right to sanitation as a fundamental right deriving from the fundamental right to life under the Constitution of India. The recognition of sanitation as a right has a longer history in India compared to its development at the international level. Even though the recognition of sanitation as a fundamental right in India can be traced back to the early 1980s, there has not been any concerted effort to adopt a statutory framework to ensure the realisation of the right in a meaningful and effective way, for instance, by ensuring its realisation for the poor and the marginalised groups.

At the same time, since the 1950s, the Union Government and state governments have been implementing sanitation interventions. In the absence of a comprehensive statutory framework, the policy framework adopted from time to time by the Union Government has predominantly regulated sanitation interventions particularly in rural areas. Thus, the realisation of the right to sanitation in India crucially depends upon a number of factors, most importantly the way in which the relevant law and policy framework understands the concept of the right to sanitation, the nature of sanitation interventions and the various strategies adopted by agencies implementing sanitation interventions at the local level. An analysis of the law and policy framework related to the right to sanitation in India reveals that it follows a skewed understanding of sanitation with adverse implications for the realisation of the right to sanitation and other rights such as the rights to water, environment, education and gender equality.

I. THE NEED TO ARTICULATE A HOLISTIC RIGHT

The term ‘sanitation’ in India is complex with significant linkages to a number of legal, social, environmental and economic factors. The conceptual boundaries of the right to sanitation in the Indian context need to be determined by taking into

consideration these factors. For instance, the issues of health, dignity and privacy are important in the context of open defecation. At the same time, issues such as dignity and privacy are defined by the existing principles of social organisation such as caste, gender and class. In this context, it is very important to understand the concept of sanitation and the right to sanitation with all its complexities and multiple linkages. This thesis has advanced a broad conceptualisation of the right to sanitation that includes the following dimensions, which are unavoidable for understanding and implementing the right to sanitation in India (discussed in Chapter 1.III).

First, access to a toilet is an important dimension of the right to sanitation in the Indian context mainly because almost 50 per cent of the total population in India does not have access to any kind of toilet and therefore defecates in the open. Open defecation may lead to environmental pollution and a number of faecally transmitted diseases, which affect children more seriously than others. Therefore, provisioning of toilets and ensuring their use are important factors from an environmental and public health point of view. Further, toilets arguably ensure dignity, privacy and security to individuals while carrying out basic bodily functions such as defecation and urination. Thus, toilets are regarded as an important sanitation intervention from the point of view of environment, and health, dignity and privacy of individuals.

Second, while provisioning and use of toilets are important elements of the right to sanitation, destruction of certain types of toilets is also equally important for the realisation of the right. India still has a significant number of dry latrines which are manually emptied and cleaned predominantly by dalit women although these latrines should have been eliminated a long time ago at least after the adoption of the Constitution of India, which explicitly prohibits the practice of untouchability. Dry latrines and the practice of manual scavenging represent a method of human excreta management that affects the dignity and health of the concerned manual scavengers and leads to environmental pollution. The practice of manual scavenging is a manifestation of caste-based untouchability. These aspects are incompatible with the right to sanitation and many other fundamental

rights guaranteed in the Constitution of India. Dry latrines and the practice of manual scavenging thus reveal that there could be certain types of toilets that may ensure privacy (and probably dignity too to some extent) to individuals who defecate or urinate in dry latrines, but they are not acceptable from the point of view of the rights of manual scavengers and the environment.

Dry latrines are not the only type of latrines that need to be destroyed. There are other types of latrines that may be acceptable from a privacy point of view, but are unacceptable from public health and environmental points of view. For instance, some people still use toilets that are just elevated facilities on a freshwater body to squat without any system such as a pit or a septic tank to contain or manage human excreta. As a result, human excreta is directly disposed into a freshwater body. Such toilets are not different from open defecation insofar as environmental and public health implications are concerned. Overall, the realisation of the right to sanitation in India depends upon how fast these toilets are destroyed and replaced by new facilities that respect privacy and dignity of individuals and ensure positive public health and environmental outcomes.

Third, the link between sanitation and caste is extremely important in the Indian context. Sanitation in India is not just about health, hygiene and environment; it has very important social dimensions too. The caste-based social organisation in India allocates all sanitation-related work to dalits. This is clear from the fact that an overwhelming majority of sanitation workers in India are dalits and they are being exploited to the extent that they work mostly in an unsafe working environment without any protection and without any social security benefits. This reveals the exploitative face of sanitation interventions in India. Given the fact that sanitation interventions are initiatives towards the realisation of a human right (ie the right to sanitation), it must not be exploitative in nature.

The fact that the practice of manual scavenging is still continuing in several states in India is another issue that exposes the entrenched link between caste and sanitation. Despite a number of legal interventions to abolish the practice of manual scavenging in the last several decades, it continues even now. Undoubtedly the government has been following an indifferent approach

apparently due to the fact that the issue primarily affects one of the most marginalised groups of people in India.

Fourth, there are gender-specific sanitation issues that need to be integrated into a comprehensive understanding of sanitation, for instance, the issues related to MHM, which is now a part of the policy framework but remains an unaddressed issue at the level of implementation. Lack of adequate and separate toilets in schools is regarded as a factor that leads to the dropping out or absenteeism of girl students from schools. In some cases, women are a target of physical and sexual violence while they access existing toilet facilities such as public toilets or when they go for open defecation. Another important gender dimension of sanitation is that toilets may increase the workload of women because generally they are responsible for fetching water for use in toilets for everyone in a family. This is an increased workload for women particularly in a context when water sources are not near their dwellings. Sanitation may also lead to increased workload for women because in a context where there is no specific government employee to clean villages, it is a common practice that womenfolk clean the public spaces and drainage in front of their respective dwellings. Thus, it is very important to take into consideration all these gender dimensions while defining sanitation and determining the nature and scope of sanitation interventions in order to avoid the sanitation sector from violating a number of rights of women including their right to sanitation.

Fifth, the rights of sanitation workers are an important aspect of the right to sanitation in India particularly in a context when sanitation workers face a number of issues related to their health and social security which are linked to their work. The rights of sanitation workers are also relevant because the violation of their rights exposes the exploitative nature of sanitation interventions in India. Thus, it is very important to ensure that the implementation of sanitation interventions does not violate the right to sanitation and other rights of sanitation workers.

Sixth, the individual acts of defecation and urination are only one aspect of sanitation, which reflect the individual dimension of the right to sanitation. Collective dimensions of sanitation such as environmental and public health

dimensions of the right to sanitation are also equally important from a right to sanitation point of view. The lack of sanitation or inappropriate implementation of sanitation interventions may lead to environmental pollution, which ultimately affects the realisation of the rights to sanitation, health and environment of all the members of a community. For instance, lack of adequate mechanism for safe management of solid and liquid waste affects the community as a whole. Similarly, sanitation interventions such as toilets and landfills cause environmental pollution on a large scale. These issues point to the need for understanding and articulating a right to sanitation that includes not only the issues of dignity and privacy of individuals in the context of defecation and urination but also the broader environmental and public health implications of lack of sanitation as well as certain sanitation interventions.

The articulation of the right to sanitation in the Indian context must take into consideration all the above-mentioned dimensions. It essentially involves individual dimensions such as privacy, dignity and security of individuals as well as collective dimensions such as social, public health and environmental dimensions that affect society and the environment as a whole.

II. REALISATION OF THE RIGHT: SUMMARY OF ISSUES RAISED

A. LAW AND POLICY FRAMEWORK: FRAGMENTATION AND LACK OF COORDINATION

Sanitation interventions in India are regulated by a complex web of constitutional provisions, statutes and policies. This is further complicated by the fact that different laws, policies and institutions function at different levels of administration from the local to the Union level and some of them focus on different individual aspects of the right rather than addressing all the dimensions in a holistic way. An analysis of the existing law and policy framework reveals three important characteristics that are relevant in the context of the right to sanitation—the legal recognition of the right to sanitation, the fragmented nature

of the statutory framework and the issue of regulation of sanitation interventions by the policy framework.

The most important aspect is the recognition of the right to sanitation as a fundamental right deriving from the fundamental right to life under article 21 of the Constitution of India. The higher judiciary in India has explicitly and implicitly recognised sanitation as a fundamental right. A number of statutes also recognise sanitation as a right albeit with different nature and scope. The articulation of sanitation as a fundamental right in India began in the early 1980s and similar developments have taken place at the international level subsequently. At the outset, the legal recognition of the right to sanitation is not a serious issue in India; instead the critical issues are the nature, scope and functioning of the statutory and policy framework that contributes towards the realisation of the right (discussed in Chapter 1.I).

Sanitation is a multi-dimensional issue and therefore the existence of different statutory and institutional frameworks that address different dimensions of the right may be unavoidable. This may not even be an issue unique to the right to sanitation. However, the key issue here is the coordination or communication between different statutory and institutional frameworks. Experience from fieldwork and an analysis of relevant secondary literature reveal that different statutory and institutional frameworks hardly communicate with each other and most of the time they work within a narrow understanding of their mandate without taking into consideration the implications for, and links with, other issues. For instance, the lack of coordination between sanitation related institutions on the one hand and institutions related to water supply, health and environment on the other hand is a crucial issue that affects not only the realisation of the right to sanitation but also other rights such as the rights to water, health and environment (discussed in Chapter 2.I).

The fragmented nature of the statutory framework has further led to a situation where different dimensions of sanitation are addressed or regulated without putting them in the broad context of the realisation of the right to sanitation. To put it differently, regulation of different sanitation issues under different statutes

by different institutions has led to an understanding of sanitation in a piecemeal manner by different implementing and regulatory agencies. For instance, local bodies usually focus on building toilets at the household level and in public places and do not perceive the environmental implications of toilets as part of or linked to their mandate. At the same time, authorities responsible for implementing environmental laws such as SPCBs believe that toilet-related issues are not part of their mandate.

In contrast to the fragmented approach followed by the statutory framework, a policy framework has progressively emerged that exclusively addresses sanitation issues. This has been particularly the case with sanitation interventions in rural areas at least since the adoption of the CRSP in 1986. The Union Government has used the policy framework to provide funds to state governments and local bodies to implement sanitation interventions. This scenario has led to the regulation of sanitation interventions predominantly by the policy framework with little or no coordination with the existing statutory framework such as the laws governing local bodies and environmental laws (discussed in Chapter 2.II).

The regulation of sanitation interventions predominantly by the policy framework leads to significant implications for the realisation of the right to sanitation. The policy framework is framed by the executive wing of the government and is not subjected to scrutiny by, or debate among, the elected representatives of the people. Further, the policy framework is more easily amenable to changes at the will of the executive. This was evident for example in the case of the policy framework for rural sanitation, which has been changed three times since the mid-1980s and some of these changes have introduced drastic reforms with significant implications for the realisation of the right to sanitation. The fact that the realisation of a fundamental right is exclusively decided by the executive without any participation from the people or their representatives raises concerns from democracy and human rights points of view. Further, the regulation of sanitation interventions by the policy framework has left little scope or place for accountability and remedies to right-holders in cases of violation of their rights (discussed in Chapter 2.III).

B. POTENTIAL AND LIMITATIONS OF INCENTIVES AND DEMAND-ORIENTED APPROACH

Sanitation interventions in India have shifted its approach from supply-oriented to demand-oriented which focuses on awareness creation programmes and incentives to generate demand to achieve sanitation goals. While these strategies or approaches are not per se problematic, they raise important concerns on their potential and limitations to contribute to the realisation of the right to sanitation.

Conceptually the ideas of incentives and demand generation cannot co-exist with the rights-based approach mainly because they are premised upon an understanding of sanitation as a responsibility of individuals. Further, it follows the premise that a major obstruction to achieve sanitation goals is the lack of awareness of the benefits of sanitation among individuals. These premises naturally lead to redefining the role of the State from that of a primary duty bearer to that of a facilitator. It is very difficult, if not impossible, for such a framework to be rights-based.

Nevertheless, such a framework could still be rights fulfilling because they may lead to the realisation of the right to sanitation. The experience of implementation of sanitation interventions at least since the late 1990s shows that the strategy of incentives and demand generation have hardly led to the realisation of the right to sanitation. Focus has predominantly been on creating sanitation infrastructure mainly toilets with little focus on their use and technology which raises the issue of non-realisation of the right to sanitation and environmental pollution (discussed in Chapter 3.II).

People's behaviour is indeed a critical factor that determines the achievement of sanitation goals and realisation of the right to sanitation. The participation of right-holders is therefore extremely important. However, this does not mean that the State ceases to be the primary duty-bearer. The State cannot or shall not shy away from its duties. Incentives and demand-generation are useful strategies in a framework where they are understood as one of the several tools for the State to fulfil its duties and to help right-holders to realise their rights.

The realisation of the right to sanitation is a complex process where multipronged strategies are required. A complete top-down model of implementation or a complete transfer of responsibility to the community may not work. While the former is fraught with the issue of unusable or unused sanitation infrastructure, the latter is fraught with the issue of an oversimplified understanding of community that is blind to the issue of various power imbalances. Thus, it is very important to understand incentives and demand-generation for what they can realistically achieve. A dogmatic approach as followed by the ongoing policy framework for sanitation may undermine the realisation of the right to sanitation as well as undermine the potential of incentives and demand-generation to contribute to the realisation of the right to sanitation in a rights-based framework.

C. IMPLEMENTATION ISSUES

In India, the policy framework has predominantly regulated sanitation interventions that contribute to the realisation of the right to sanitation. Further, the policy framework is the key reference point to understand the meaning and scope of the term ‘sanitation’ in a context where the Constitution of India and the relevant statutes do not provide a definition. The ongoing policy framework, that is the SBM, does not provide a definition, but it does provide the elements of sanitation interventions from which a definition of the term ‘sanitation’ can be deduced. Thus, the policy framework is the most important mechanism to examine and analyse the realisation of the right to sanitation.

1) *Reductionism and exclusion*

The policy framework in India follows a broad definition of the term ‘sanitation’ that includes a number of important dimensions such as access to toilets, management of solid and liquid waste, elimination of manual scavenging and MHM. This definition takes into account key concerns such as elimination of open defecation, protection of public health, protection of the environment and sanitation-related needs and concerns of women.

However, at the level of implementation, sanitation is understood in a narrow way, which focuses primarily and overwhelmingly on toilets with the objective of

elimination of open defecation. The focus on toilets has also led to the exclusion of the sanitation-related needs and concerns of several groups of people. Sanitation interventions have perceived open defecation as a technical issue that needs to be addressed through a technical solution, that is toilets. They do not adequately focus on sanitation needs of the poor and the marginalised groups in society such as the elderly, the people with disabilities, migrant labourers, the homeless people and the transgender people. This occurs mainly because sanitation interventions are being implemented as a mission in a phased manner and they focus mainly on the number of toilets rather than their use and contribution to the realisation of the right to sanitation. The success of the mission is usually measured in terms of the number of toilets that have been constructed and there is hardly any mechanism to ensure public health and environmental outcomes and the realisation of human rights. To put it differently, sanitation interventions are not being implemented as an initiative to facilitate the realisation of the right to sanitation and other human rights with a focus on the poor and the marginalised on a priority basis (discussed in Chapter 3.1).

2) Undermining of gender equality and right to sanitation of women

The focus on toilets followed by sanitation interventions has led them to being myopic to the sanitation-related needs and concerns of women. Even though gender plays a crucial role in shaping people's perception towards and use of toilets, sanitation interventions have by and large neglected this factor. For instance, women are hardly consulted while taking decisions on toilet construction which in some cases leads to the construction of toilets at the front side of a house—a place which is generally occupied by men and therefore not accessible for women all the time mainly due to patriarchal norms. Similarly, women specific sanitation needs such as facilities for MHM have been undermined as a result of a gender-neutral approach.

While sanitation interventions are myopic to the sanitation-related needs and concerns of women, they actively use 'gender' to promote its objectives. This is, for instance, clear from the fact that awareness creation programmes or the

triggering exercises at the local level have used women specific narratives and patriarchal messages to promote the construction of household toilets. On the one hand, women specific messages make it look like sanitation interventions are meant only for women. This has apparently influenced the use of toilets. For instance, there are many places where toilets are used only by women and girls, and men defecate in the open despite having a toilet at home. On the other hand, these strategies reinforce the existing ideas of patriarchy and thereby undermine women's rights and the principle of gender equality. This raises the question of the need for ensuring the realisation of the right to sanitation without violating other human rights and undermining other social goals (discussed in Chapter 4).

3) Environmental issues as second generation sanitation issues

Implementing agencies have neglected the environmental dimensions of the right to sanitation. Thus, the issues of environmental pollution due to the discharge of untreated or partially treated wastewater and burning and burying of used sanitary napkins are treated as second generation sanitation issues that are to be addressed after addressing first-generation sanitation issues, mainly the issue of open defecation. The neglect of the environmental dimensions of sanitation has also led to the implementation of sanitation interventions without due regard to their implications for the environment. For instance, a number of toilets that have been constructed so far have not followed relevant environment-related norms such as the norms relating to the design of toilet pits or septic tanks and the distance to be maintained between a toilet and a drinking water source. As a result, instances of sanitation interventions causing environmental pollution are not uncommon in India, which adversely affects the realisation of the right to sanitation and the right to environment (discussed in Chapter 5).

4) Paying lip service to the issue of manual scavenging

Dry latrines and the practice of manual scavenging are still continuing in various parts of India. Given the fact that the Constitution of India prohibits the practice of manual scavenging as it is a manifestation of the practice of untouchability and there has been explicit statutory prohibition of manual scavenging at least since

1993, sanitation interventions should have focused on the demolition of dry latrines on a priority basis. However, this has not occurred in practice. The policy framework has been by and large insensitive to the issue of manual scavenging and it appears that implementing agencies have treated the practice of manual scavenging an issue that does not fall within its mandate.

While sanitation interventions have not taken up the goal of eradication of manual scavenging, there is a strong possibility that the sanitation infrastructure that are being or have been built as a part of sanitation interventions are likely to exacerbate manual scavenging. In the absence of adequate precautions, the development of sanitation infrastructure such as toilets and sewerage systems will need people to maintain them. For instance, if sanitation interventions do not focus on faecal sludge management, the millions of toilets that are being constructed or that have already been constructed may require human beings to empty them in future. Given the fact that caste continues to be a dominant factor in the context of sanitation-related work, dalits are more likely to carry out this 'work' due to social and economic pressure. Such a scenario will most likely lead to the re-appearance of manual scavenging even in places where the practice has been eliminated. Thus, sanitation interventions are being implemented in such a way that the elimination of the practice of manual scavenging is likely to be even more difficult in the future and in fact the possibility of it becoming rampant is high (discussed in Chapter 6).

5) *Exploitation of sanitation workers*

Sanitation interventions have been actively and passively promoting the exploitation of sanitation workers and thereby entrenching the centuries old system of caste-based allocation of sanitation work. The exploitation in this regard has different angles. Most importantly, sanitation interventions are myopic to the caste dimension of sanitation and therefore do not focus on the fact that an overwhelming majority of sanitation workers are dalits. In fact, in several rural areas, local bodies even bring dalits from far-away places to clean villages. Another important facet of exploitation is the issue of lack of a safe working environment and lack of social security faced by sanitation workers. This is clear

from the fact that the death of sewage workers while cleaning sewage is not uncommon in India. Overall, sanitation interventions have exploited sanitation workers and have reinforced the link between caste and sanitation work. It is ironical that the initiatives to promote the realisation of the right to sanitation lead to violation of the right to sanitation and other human rights of some of the marginalised groups of society (discussed in Chapter 7).

III. MAKING THE RIGHT A REALITY FOR ALL: OPPORTUNITIES UNDER THE SWACHH BHARAT MISSION

As summarised above, this thesis has highlighted the huge gap between the concept of sanitation as defined in the law and policy framework and the way in which sanitation interventions have been implemented at the local level. This gap is problematic from a right to sanitation perspective because of its implications for the realisation of the right to sanitation in general and particularly for the poor and the marginalised. An understanding and recognition of these issues should ideally lead to effective changes in the law and policy framework in order to address them. In this regard, the ongoing SBM presents an important opportunity to address some of these issues.

The SBM was adopted in 2014 with the objective of bringing about significant improvements in sanitation conditions in rural and urban areas. It has set a timeline of 2 October 2019 to achieve the goal of ‘Swachh Bharat’. The SBM has received significant attention of the Union Government, state governments and some of the important international agencies that work on sanitation-related issues such as the World Bank and the WSSCC. This presents an important opportunity to introduce radical changes to make the SBM a framework based on the concept of the right to sanitation. In fact, it is essential for the SBM to incorporate the right to sanitation while designing and implementing sanitation interventions in light of the recognition of the right to sanitation by the higher judiciary in India. In this regard, the following changes may help to redesign the SBM along the line of the right to sanitation and to transform the SBM into a rights-based framework:

First, a statutory framework that recognises the right to sanitation explicitly and regulates the implementation of sanitation interventions would be a preferable step to ensure the operationalisation of the right to sanitation as understood in the context of the Constitution of India. However, this requires state governments to come forward because the Constitution of India vests the state governments with the power to enact legislation on sanitation. It appears that state governments are currently not considering such a step and therefore, a comprehensive legislation to regulate sanitation interventions is unlikely in the near future. It also does not seem to be probable that at least a few state governments would approach the Union Government to invoke article 252 of the Constitution of India that permits the Union Government to enact law on subject matters that fall within the legislative competence of state government with the consent of two or more state governments. In this context, the second-best option is to introduce necessary changes in the policy framework to make it a framework based on the right to sanitation. The remaining suggestions in this section are thus focused on the possibilities and the potential of bringing changes to the SBM.

Second, the SBM guidelines are silent on the right to sanitation and they in fact follow a programmatic approach which is significantly different from a rights-based approach. In this context, the SBM Guidelines need an amendment to explicitly include the right to sanitation as a basic guiding principle and the realisation of the right to sanitation must be included as one of the most important outcomes against which the success of the SBM must be tested or measured. Such a step will also help to include a qualitative assessment of the implementation of sanitation interventions as opposed to the current approach that focuses only on quantitative outcomes such as the number of toilets that have been built.

Third, the awareness creation programmes under the SBM focus on the advantages of adopting good sanitation and hygiene practices. While this may be essential to disseminate such information, it is not adequate in a context where both the right-holders and duty-bearers are not fully aware of the existence of the right to sanitation and its scope and meaning. In this regard, awareness creation programmes under the SBM are an opportunity to address this gap by including

information on the right to sanitation as a part of it. Further, awareness creation programmes focus only on right-holders and not on implementing agencies, which is also important because the fieldwork has revealed that implementing agencies do not consider sanitation as their statutory and constitutional duties. Thus, awareness creation programmes under the SBM must also focus on disseminating information on the right to sanitation among implementing agencies and policy makers.

Fourth, the SBM, like its predecessor programmes, focuses on achieving ODF status within the prescribed time line. The overwhelming focus on toilets has led to the undermining of other important dimensions of the right to sanitation such as health, environmental and social dimensions. As a result, sanitation issues are likely to remain or to be exacerbated even when the SBM officially achieves the goal of making India ODF. This is clear from the fact that a huge number of toilets that have been constructed as part of sanitation interventions including the SBM are lying unused or are unusable. Even though sustainability concerns have led the SBM to include monitoring of the use of toilets in the recently adopted ODF Verification Guidelines, the Union Government needs to understand and address the impact of the pressure imposed on implementing agencies at the local level as it may not go hand-in-glove with the idea of sustainability and realisation of the right to sanitation.

Fifth, implementing agencies at the local level have used various intimidating and shaming strategies to force people to construct toilets. This is partly due to the pressure imposed on implementing agencies at the local level by the concerned state government and the Union Government to achieve ODF status within the prescribed time limit. The pressure element has led implementing agencies to employ even objectionable strategies such as the use of patriarchal messages to promote the construction of toilets and the denial of, or threat of denial of, various entitlements such as entitlements under the rural employment guarantee schemes to force people to construct toilets. These issues need to be addressed immediately. It is very important to ensure that the rush to achieve ODF status does not affect other human rights and entitlements.

Sixth, the SBM as it has been framed and is being implemented functions as a self-contained framework without recognising or respecting the multiple linkages between sanitation issues and the existing legislation on the different dimensions of the right to sanitation such as the legislation that address the issues of manual scavenging, barrier free access to toilets for people with disabilities and environmental pollution. Similarly, the SBM does not recognise or work towards the implementation of legislation and judicial directives to ensure the safety of sewage workers. The SBM is, in fact, a great opportunity to give effect to these legislation and judicial directives, for instance by prioritising the demolition of dry latrines, by ensuring the regulation of toilet designs so that the need for manual scavenging does not arise in the future, by ensuring barrier free access to people with disabilities and by channelising a part of the allotted funds under the SBM to mechanise the work of cleaning of sewage and to provide protective gear and devices to sewage workers. Further, agencies implementing sanitation interventions need to work in collaboration with pollution control boards, the agency responsible for the implementation of environmental laws. This is very important in a context where both the lack of sanitation and sanitation interventions are causing environmental pollution, most importantly water pollution. Thus, agencies implementing the SBM must be forced to work towards implementing sanitation related legislation mentioned above and to work with agencies implementing other legislation relevant to the realisation of the right to sanitation.

Seventh, the SBM is being implemented as a programme in a mission mode. It seeks to achieve certain quantifiable targets within a prescribed time period. Given the sanitation crisis in India, the implementation of sanitation interventions in a mission mode is a welcome step. However, this is hardly enough and appropriate to implement a fundamental right, which essentially requires an opportunity for right-holders to enforce their right. This aspect is currently missing under the SBM probably because it has been designed to be implemented without explicitly recognising any legal duty and without undertaking any legal responsibility. One way to address this issue is by linking the SBM with the existing statutory framework that seeks to ensure accountability of various

government implementing agencies such as statutes on right to services and the Lokayukta (discussed in chapter 1.III.B).

IV. RIGHT TO SANITATION IN INDIA AND LESSONS FOR THE INTERNATIONAL LAW, POLICIES AND INSTITUTIONS

The right to sanitation as it has emerged in India and its implementation bring out important lessons for international law, policy and institutions that are relevant in the context of the right to sanitation. This is mainly because of the difference between the right to sanitation as recognised in India and at the international level. In India, the right to sanitation has been understood as a comprehensive concept that includes not only the aspect of access to toilets for individuals but also other dimensions such as social, environmental and labour dimensions. Such a conceptualisation is directly linked to the day-to-day sanitation-related experience of the poor and the marginalised. However, the right to sanitation as it has evolved at the international level predominantly focuses on the issue of management of human excreta and therefore the key issue in this regard is access to toilets. Thus, key definitions at the international level are centred around the quality of toilet facilities and the issue of access to toilets (discussed in Introduction and Chapter 1.I.B). Thus, the right to sanitation as developed at the international level is narrow in scope when compared to the right to sanitation as recognised in India. The idea of the right to sanitation at the international level does not fully capture some of the important idiosyncratic dimensions of the right to sanitation in India and possibly other developing countries too, such as manual scavenging, issues faced by sanitation workers and issues around sanitation-related needs and vulnerabilities of women.

In this context, the right to sanitation as it has emerged in India may be relevant to re-think the conceptual boundaries of the right to sanitation at the international level. The social, environmental and labour dimensions of the right to sanitation in India may be common factors in many other developing countries and therefore it is important for the right to sanitation at the international level to reflect these

issues and concerns in order to make it acceptable to and relevant for a vast majority of the people in developing countries.

It is to be noted that some of these neglected dimensions have progressively received attention at the international level, for instance, the issues of gender-based violence in the context of open defecation, and lack of facilities for MHM. While these may be progressive steps, they are also problematic to the extent that selective prioritisation may not completely reflect the needs and concerns of the people in developing countries. For instance, the overwhelming focus on, or promotion of, toilets as a solution to gender-based violence in effect underplays the role played by the existing gender-based power relationships in perpetrating or normalising violence against women. Similarly, the promotion of sanitary napkins as a solution to issues related to MHM has also been criticised as an approach that is mainly informed by Western experiences and it does not take into consideration the underlying cultural factors and lived experiences of women and girls in many developing countries including India.

Therefore, it is important that international policies and institutions should not be too prescriptive in defining the conceptual boundaries of the right to sanitation. Further, they must not promote selective prioritisation of certain sanitation issues over others and impose it on developing countries through their soft powers such as funding and production of knowledge. Instead, an appropriate approach would be to listen to the developments and critical voices from developing countries particularly of those people who suffer the most such as women, dalits and the poor. This will be crucial to make the concept of the right to sanitation appealing to the people of developing countries.

Experiences from India as discussed in this thesis reveal some of the counter-productive implications of policy interferences by international institutions such as the World Bank and the WSSCC. These institutions play a crucial role in training implementing agencies and shaping the sanitation agenda of the country. For instance, the World Bank provided training to implementing agencies in Rajasthan and the WSSCC was instrumental in bringing MHM on the sanitation agenda. While steps or interferences like these may not be problematic per se,

they may sometimes become counter-productive as was the case in Rajasthan where implementing agencies, who were trained by the World Bank, ‘liberally’ used gender stereotyping messages to promote the construction of toilets. Similarly, the conceptual framework of MHM as promoted by the WSSCC and as adopted by the Union Government presumes the ignorance of a vast majority of women and girls in India about the biological process of menstruation and essentialises sanitary napkins. Scholars and activists in India and elsewhere have increasingly challenged both of these steps. This points to the need for international institutions to be aware of the wider implications of their policy interferences, particularly implications for human rights such as the right to gender equality. Further, policy interferences, knowledge production and channelisation of money by international institutions must not be based on a selective prioritisation of issues without taking on board local narratives, voices and experiences.

EPILOGUE

The poor and the marginalised face serious sanitation issues, like many other human rights related issues. The articulation of the right to sanitation becomes important in this context particularly to make a better sanitation scenario a reality for the millions of suffering people in developing countries including India. Therefore, their experiences are extremely important in drawing a conceptual framework and implementation strategies. This thesis has taken into consideration various infrastructural, social and environmental dimensions of sanitation in India to develop a conceptual framework for the right to sanitation and has provided a critical analysis of the law and policy framework that defines and implements sanitation interventions in India from a right to sanitation perspective. This analysis reveals a significant gap between the existing conceptual framework that follows a broad definition of sanitation and the implementation of sanitation interventions that follow a very narrow understanding of sanitation that is limited to elimination of open defecation. Consequently, important dimensions such as manual scavenging, environmental pollution, gender dimensions and issues faced by sanitation workers are missing at the level of implementation, which lead to

only a partial realisation of the right to sanitation that too for a privileged few, which is unacceptable from a right to sanitation point of view. A holistic understanding of the right to sanitation with all possible linkages seems unavoidable to make it a reality in a sustainable manner.

The right to sanitation promises many things—a life of dignity, health, privacy, safety and it contributes to the realisation of human rights such as the right to education particularly of girl students and the right to environment. While a framework based on the right to sanitation could contribute to the achievement of these objectives, it is not advisable to blindly believe in the empowering and emancipatory capacity of the right to sanitation or a rights-based approach to sanitation. A sceptical approach might help to question the right to sanitation project from the perspective of the poor and the marginalised. This is particularly relevant in the right to sanitation context in India and probably in other developing countries too because sanitation represents a site of discrimination against, and oppression and exploitation of, the poor and the marginalised.

Human rights arguably help people to fight against discrimination and various forms of oppression and exclusion. While the idea of human rights rightfully promises so, there is a sharp contrast with what is happening in reality. Caste, class and gender determine the realisation of all rights including the right to sanitation. The historically oppressed and marginalised continue to be either invisible or the law and policy framework pays only lip-service to their issues and concerns. Sanitation is a good example where the factors such as caste, class and gender impede the realisation of rights including the right to sanitation of the poor and the marginalised groups of society. Therefore, the emerging right to sanitation has huge and tough tasks ahead. The success of the right to sanitation will depend upon how it caters to the needs of the poor and the marginalised, and how it will understand and address the caste, gender and class factors that affect the realisation of the right to sanitation among other rights.

The realisation of the right to sanitation in India will inevitably depend on the extent to which implementing agencies will be able to think and act beyond the construction and counting of toilets. While this requires proactive effort from

policy makers and implementing agencies to change their understanding and perceptions, it also requires collective effort from the right-holders. At the end of the day, the realisation of rights crucially depends upon how, and to what extent, the right-holders understand and claim their rights.

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ANNEXURES

A. ANNEXURE 1: FRAMEWORK OF SEMI-STRUCTURED INTERVIEWS

Right holders

- Do you have a toilet?
- Do you all use toilet on a daily basis?
- Can the toilet be used?
- How is the emptying of pit done? Who does that?
- What kind of assistance you get from the government for IHHL? How easy or difficult is it to get such financial assistance?
- Is caste or class a determining factor in getting government assistance?
- What type of sanitation facilities are available in public places such as market, bus stand etc.?
- Who cleans the public places in your village?
- Do you have water supply at home?
- Distance from the source or sources of water supply?
- How many members are there in your family?
- Who cleans the toilets?
- What is the situation of SLWM in your village?
- Why do you go for or prefer open defecation?
- What are the risks posed by open defecation?

Implementing agencies (Gram Panchayat (GP), Block, District Sanitation Mission)/Government departments (health)/NGOs

- Who cleans the public places in your village?
- Is there a public/community toilet in your GP?
- Membership of village level monitoring committees/prerak committees?
- How do you enforce?
- How long do they monitor?
- What is the incentive for monitors?
- Do the people know about the committee?
- Do you use the language of rights in triggering and behavioural change?
- How the enforcement is being done?
- What kind of penalties or punishment is imposed for open defecation?
- How the motivation and triggering are done?
- What are major focus areas for this exercise?
- What is the situation of solid and liquid waste management in your village?
- In what stage is the solid and liquid waste management in the district?

Schools/Anganwadis

- Who cleans the toilets?
- Do you have toilets at schools?
- Are there separate toilets for girls and boys?
- How many students are there in the school?
- How many toilets are there in the school?
- Who cleans the toilets?
- Is there MHM facilities available?
- Are there toilets for teachers?
- Do you have water supply in toilets?
- Do girls miss school due to absence of menstruation related facilities?

B. ANNEXURE 2: LIST OF PLACES VISITED AND PEOPLE AND ORGANISATIONS MET/INTERVIEWED

(The method of focus group discussion was followed in certain villages in all the three states. Names of individuals who attended these focus group discussions were not collected and therefore not included in the list. Name of such villages are however mentioned here.)

1) KERALA

Ernakulam

- A.X. Varghese, Lawyer, Kochi
- David, Village Extension Officer, Kothamangalam Block
- PK Alexander, Kerala Suchitwa Mission Dist Coordinator, Ernakulam
- Pratheeksha, Kerala Suchitwa Mission Asst Coordinator, Ernakulam
- Septage treatment plant and Landfill in Brahmapuram.
- Shijo, Village Extension Officer, Kothamangalam Block
- Vellamakkunnu tribal colony, Kothamangalam Block
- Vypeen Block

Kannur

- Dr K. Gangadharan, Kannur University
- Gibson, Kerala Water Authority
- Isaac, Deputy Director, Diary Development Department
- KK Rajeevan, Thalaseery Block Panchayat President
- Pavithran, Kathirur GP President
- Reghunath, Health Supervisor
- Sajila, Asst Health inspector
- Sangeeth, VEO, Paayam GP
- Sudeshan, Kerala Suchitwa Mission District Coordinator
- Suresh, Kerala Suchitwa Mission Assistant Coordinator
- Tyny, BDO, Kannur Block

Thiruvananthapuram

- Abraham Thomas Renjith, Programme Officer, Kerala Suchitwa Mission
- Arun, Jalanidhi
- CS Lathika, Programme Officer, Kerala Suchitwa Mission
- LP Chittar, Programme Officer, Kerala Suchitwa Mission
- MS Mythili, Member Secretary, Kerala Pollution Control Board
- Pramod, Deputy Director, Jalanidhi
- Salim, Kerala Shuchitwa Mission
- Shaji Clement, Kerala Suchitwa Mission District Coordinator
- Shibu K Nair, Thanal
- Subash, Vilappilsala Janakeeya Samara Samithi
- Vilappilshala Grama Panchayat
- VL Mohan Kumar, Director – Monitoring, Jalanidhi

Wayanad

- Asmath PK, President, Panamaram Grama Panchayat
- K. Divakaran, Block Development Officer Mananthavady
- Kelu, Thirunelli Gram Panchayat President
- Puzhavayal tribal colony
- Sudhakaran, District Coordinator, Kerala Suchitwa Mission
- Surendran, District Coordinator, Kerala Suchitwa Mission

2) RAJASTHAN

Bikaner

- Anandji Parikh, Teacher, Kolayat block
- Arti Dogra, District Collector
- Arvind Ojha, Secretary, Urmul Trust
- Dr NK Gupta, Officiating Chief Medical Officer, Bikaner
- Gopal Kumavat, S/o Mooli Devi Kumawat, Sarpanch, Kari Charna
- Kavita Jain, Member, Block Resource Group
- Kesuram, Mandal Charna.
- Mahinder Singh Shekhawat, District Project Coordinator, Bikaner
- Mukesh Ojha, Member, Block Resource Group
- N. Upadhyay, Teacher, Kolayat block
- Naveen Kumar Sans, Communication and Capacity Development Unit
- P. Pangalal, Teacher, Kolayat block
- Pawan Panchariya, Member, State Resource Group
- Poonam Joshi, Member, State Resource Group
- Pradeep Kumar Pandya, Accountant
- Priyanka Gupta, Officer, Health Department
- Raja Sharma, Teacher, Kolayat block

- Satyapal Meena, Senior Engineer, Bisalpur Project
- Shrawan Kumar Sharma, Additional Chief Engineer (Project), Aapni Yojana II
- Veerpal Singh, Office of the Development Officer, Panchayat Samiti Office, Kolayat
- Vikas Gupta, Public Health Engineering Department

Churu

- Bawarlal, Jaisingsar, Sardarshahar
- Boraram, GP caretaker, Sevua, Rajgarh
- Dinesh, Block Coordinator (Rajgarh), Sanitation
- Dr Manoj Sharma, Yogacharya Marudhar Yuva Sansthan
- Farzana, District Accredited Social Health Activists Coordinator
- Gomti Devi, Sanitation coordinator, Sardarshahar
- GS Poonia, Project Manager, Bhoruka Charitable Trust, Bhorugram, Rajgarh
- Hari Ram, Jaisingsar, Sardarshahar
- Jitendra, Supervisor, Primary Health Centre, Gogasar
- Kailash Choudhary, Block Development Officer, Sardarshahar
- Mohanlal, Sarpanch's husband, Sevua, Rajgarh
- Pradeep Maal, Rozgar Sevak, Seuva panchayat, Rajgarh
- Pulla Ram, Paharsar
- Radhey Shyam Maurya, Reproductive and Child Health Officer
- Rakesh Kumar Saran, School Teacher, Jaisingsar, Sardarshahar
- Rakesh Saran Kumar, Jaisingsar panchayat
- Ram Kishore, Sanitation Coordinator
- Ravindra Parikh, Teacher, Paharsar
- Santosh, Save the Children, Sardarshahar
- Shyam Lal Sharma, Sanitation District Coordinator
- Sitaram Dhangri, Maalsar panchayat
- Sravan Kumar Sharma, Chief Executive, Aapni Yojana
- Vivek Kumar Arora, Chief Executive Officer, Churu District

Jaipur

- Dr Gautam Sadhu, Dean (Rural Management), Indian Institute of Health Management Research
- Dr KB Kothari, Pratham
- Dr MS Rathore, Director, Centre for Environment and Development Study
- Matthews K Mullackal, Water and Sanitation Program
- Nivedita, Bodh Shiksha Samiti
- Pankaj Mathur, UNICEF
- Sandeep Edwin, Journalist
- Suneet Sethi, Consultant, Water and Sanitation Support Organization

- Sunny Sebastian, Haridev Joshi University of Journalism and Mass Communication

Tonk

- Anandi Lal Vaishnav, Chief Executive Officer
- Gurdan Devi, Sarpanch, Chandlai
- Mohd Zakkir Hussain, Jheerana
- Mukesh, Accountant
- Radhey Shyam Gupta, Assistant Engineer, Public Health Engineering Department
- SP Meena, Bisalpur Project Office, Deoli,

3) UTTAR PRADESH

Chitrakoot

- Dr NK Gupta, Chief Medical Officer, Karvi
- Dr. Narayan Goyal, Medical Officer
- Harijan basti, Itkari village, Karvi block
- Harijan colony, Bhaglayi village
- M Rafeeq, District Education Nireekshak
- Manikpur Block
- Masoda village
- Monica Rani, District Collector
- Rampal Singh, District Panchayati Raj Office
- Santosh and Avdesh, Vanangana
- Teekapur adivasi colony, Manikpur block
- Valmiki basti, Kuberganj

Kushi Nagar

- Baijnathpur/khanwar baklolahi (NGP villages in Padrauna block)
- Brijesh Thiwari, District Project Coordinator (Sanitation)
- Naurangiya village

Lucknow

- AK Shahi, District Panchayati Raj office, Lucknow
- Jitendar Kumar/Santosh Kumar, Consultants, NBA [state sanitation mission]
- Puneet, WaterAid, Lucknow
- RC Thripathi, UP Jal Nigam
- Satyendra Singh, District Project Coordinator Sanitation
- Seema Kumar, State Water and Sanitation Mission

Pratapgarh

- Asogi village
- Babganj block
- D. Pandey, Kuswapur
- Dr. Vivek Yadav, Medical Officer, Kala Kankar
- Hinahu Pradhan/Dhirendra Srivastav, Accountant, Kala Kankar
- Karetty village
- Maikapura village
- Mr Nair and Ashok Kumar, Village Development Officers
- Mr. Ravendra, Sangrampur
- Mr. Yadav, Kunta block Assistant Development Officer
- Mubarakpur village
- Rama Sankar Singh, Kala Kankar Block Development Officer
- Sangrampur village
- Shivnath Yadav, Chakpurvi village
- Sundas village